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In The
Supreme Court of the United States

PUBLIC EMPLOYEES RETIREMENT BOARD
OF THE PUBLIC EMPLOYEES RETIREMENT
ASSOCIATION OF NEW MEXICO,

Petitioner,

vs.

JAMES GILL,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court
Of The State Of New Mexico

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER A PRIVATE INDIVIDUAL MAY PURSUE *EX PARTE YOUNG* RELIEF AGAINST STATE OFFICIALS FOR VIOLATION OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT DESPITE THE FACT THAT THE ACT CONTAINS A COMPREHENSIVE REMEDIAL SCHEME.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, Defendant-Appellee below is the Public Employees Retirement Board of the Public Employees Retirement Association of New Mexico.

Respondent, Plaintiff-Appellant below is James Gill.

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PETITION FOR WRIT OF CERTIORARI

The Public Employees Retirement Board of the Public Employees Retirement Association of New Mexico – the defendant in the trial court and the appellee in the court below – respectfully petitions for a writ of certiorari to review the decision of the New Mexico Supreme Court in this case.

OPINIONS BELOW

The decision of the New Mexico Supreme Court in *James Gill v. Public Employees Retirement Board* (April 28, 2004, No. 27,823) is reprinted in its entirety at *Appendix A* hereto. The New Mexico Supreme Court issued this "substitute opinion" to replace its earlier opinion which is reprinted in its entirety at *Appendix E* hereto. The decision of the New Mexico Court of Appeals in *James Gill v. Public Employees Retirement Board*, 2003-NMCA-038, 133 N.M. 345, 62 P.3d 1227, is reprinted in its entirety at *Appendix C* hereto. The First Judicial District Court's Order Granting the Public Employee Retirement Board's Motion to Dismiss for Lack of Subject Matter Jurisdiction is reprinted in its entirety at *Appendix B* hereto.

JURISDICTION

Petitioner seeks this Court's review of the opinion entered on April 28, 2004, by the New Mexico Supreme Court. The New Mexico Supreme Court denied Petitioner's Motion for Rehearing by Order entered May 20, 2004. The

jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

RULE 29.4(b) CERTIFICATION

Because 28 U.S.C. § 2403(a) may apply and the United States is not a party hereto, copies of this certiorari petition are being served on the Solicitor General of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2 of the United States Constitution provides, in pertinent part:

> This Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

* * *

The Eleventh Amendment to the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

* * *

Sections 623, 626, and 630 of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (2000), the texts of which are set forth in *Appendix J* hereto.

* * *

New Mexico Statutes Annotated, § 10-11A-2(E) (1983) of the New Mexico Volunteer Firefighters Retirement Act (§§ 10-11A-1 through -7), which, prior to amendment in 2003, provided in pertinent part:

> "member" means any volunteer nonsalaried firefighter who is listed as an active member on the rolls of a fire department and whose first year of service credit was accumulated during or after the year he attained the age of sixteen and no later than during the year in which he attained the age of forty-five.

* * *

New Mexico Statutes Annotated, § 10-11A-2(E) (2003) of the New Mexico Volunteer Firefighters Retirement Act which currently provides in pertinent part:

> "member" means any volunteer nonsalaried firefighter who is listed as an active member on the rolls of a fire department and whose first year of service credit was accumulated during or after the year he attained the age of sixteen.

* * *

New Mexico Statutes Annotated, § 10-11A-5(B) (1983) provides in pertinent part:

> Any member who attains the age of fifty-five years and has at least ten but less than twenty-five years or more of service credit shall be eligible to receive a retirement annuity of one hundred

(dollars) ($100), payable monthly from the fund during the remainder of his life.

STATEMENT OF THE CASE

THIS MATTER comes before the Court on a petition seeking certiorari from a final decision of the New Mexico Supreme Court, the State's highest court. The New Mexico court has determined that private individuals may sue state officials for violations of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* (2000) ("ADEA") under the *Ex Parte Young* fiction despite this Court's opinion in *Kimel v. Florida Board of Regents,* 528 U.S. 62 (2000), and without regard to the fact that the ADEA contains a congressionally mandated comprehensive remedial scheme.

Petitioner, the Public Employees Retirement Board (hereinafter, "PERB") of the Public Employees Retirement Association ("PERA") of New Mexico is a state agency which acts as the trustee of the PERA and the funds created by the State's retirement acts. *See* NMSA 1978 § 10-11-130(A) (1992). Respondent was a member of the Hondo Volunteer Fire Department from 1974 to 1997. Upon his retirement from the Department in 1997, Mr. Gill applied for retirement benefits under NMSA 1978, § 10-11A-5(B) (1983) of the Volunteer Firefighters Retirement Act ("VFRA"). At that time, §10-11A-2(E) of the VFRA provided retirement benefits for volunteer firefighters whose first year of service credit as a volunteer firefighter was accumulated "no later than during the year in

which he attained the age of forty-five." (1983, amended 2003).[1]

PERB denied Gill's claim for benefits, pursuant to statute, because he was over the age of 45 in the year in which he began volunteering for the Hondo Volunteer Fire Department. Respondent filed a charge with the Equal Employment Opportunity Commission ("EEOC") and the New Mexico Human Rights Division against the Hondo Volunteer Fire Department and PERA alleging that the Department and PERA had discriminated against him on the basis of his age in violation of the ADEA, when it denied his request for retirement benefits.

Mr. Gill subsequently filed his lawsuit against the PERB claiming that the VFRA violated the ADEA. Respondent sought damages as well as declaratory and injunctive relief, including an injunction that would require PERB to discontinue enforcement of the portions of the VFRA that made him ineligible for retirement benefits.

In the state trial court, PERB filed a motion to dismiss asserting the state's sovereign immunity to ADEA claims affirmed in *Kimel v. Florida Board of Regents,* 528 U.S. 62 (2000). The district court granted PERB's motion and dismissed the suit. *(Appendix B).* Respondent appealed. On appeal, Respondent argued that the individual members of PERB, who had not been named as defendants,

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[1] Section 2(E) now provides that volunteer firefighters whose first year of service credit was accumulated during or after the year the firefighter attained the age of sixteen are eligible for the retirement benefit. The statute does not retroactively apply to afford Respondent retirement benefits. (*Appendix A at 3*).

could be sued for prospective injunctive relief under the *Ex Parte Young* fiction.

The New Mexico Court of Appeals rejected Respondent's *Ex Parte Young* argument and affirmed the trial court's dismissal. *(Appendix C at 35).* In its Opinion, the court of appeals noted that *Kimel* dismissed plaintiffs' claims for declaratory and injunctive relief as well as their damages claims because Congress lacked the authority to abrogate the states' constitutional sovereign immunity to private ADEA suit without regard to the relief requested. *(Appendix C at 41). See also Federal Maritime Comm'n v. South Carolina State Ports Authority,* 535 U.S. 743, 765 (2002). Rejecting the argument that *Ex Parte Young* actions to enforce ADEA claims against state governments were "necessary to effectuate the Supremacy Clause," the court of appeals declared:

> The dismissal of the declaratory and injunctive aspects of the suits in *Kimel* [*v. Florida Bd. of Regents,* 528 U.S. 62 (2000)] may therefore be properly understood as emanating from the same doctrine of supremacy. If the purpose of the *Ex Parte Young* doctrine is to ensure the Constitution's supremacy, then a congressional act that is constitutionally outside of Congress's power to enact as against the states should not be permitted to be enforced against the states in any way, either in state or federal court. That the ADEA's abrogation of sovereign immunity is constitutionally outside of Congress's power to enact is clear according to *Kimel*, 528 U.S. at 91.

(Appendix C at 41).

The New Mexico Supreme Court granted Respondent's petition for certiorari and issued two opinions. In its

first opinion, the supreme court reversed the court of appeals' determination that the *Ex Parte Young* fiction was not available to enforce alleged violations of the ADEA against state officials. *(Appendix E at 49).* In both its first opinion and its "substitute opinion," the supreme court stated that the court of appeals' ruling "directly conflicts with *Alden* [*v. Maine,* 527 U.S. 706 (1999)] . . ." *(Appendix E at 54, Appendix A at 9).* The supreme court reasoned that the immunity recognized in *Alden* "does not undermine the basic *validity* of the legislation"[2] [emphasis in original]. The supreme court rejected Petitioner's argument that *Kimel* prohibited all ADEA suits against the state and its officers without regard to the relief sought *(Appendix E at 54, Appendix A at 9);* rejected Petitioner's argument that the ADEA's comprehensive remedial scheme precluded resort to *Ex Parte Young* claims against state officials for age discrimination *(Appendix E at 57, Appendix A at 12);* and rejected Petitioner's argument that the factors set out in *Idaho v. Coeur d'Alene Tribe,* 521 U.S. 261 (1997) for determining when *Ex Parte Young* actions would impinge on core sovereign interests, militated against resort to an *Ex Parte Young* remedy. *(Appendix E at 64, Appendix A at 20).* In fact, the supreme court

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[2] *Kimel*, unlike *Alden*, can be read as seriously undermining the "basic validity" of the ADEA as applied to the states. The *Kimel* court's Fourteenth Amendment analysis, wholly missing from *Alden*, concludes that the extension of the ADEA to the states was not "appropriate" legislation under Section 5 of the Fourteenth Amendment. *Kimel at 83*; *see also Rice v. NSA, et al.*, 244 F.Supp.2d 594, 603 (D.S.C. 2001). Additionally, because age is not an immutable characteristic such as race, gender and national origin recognized as a suspect or quasi-suspect class, it is questionable that Congress has the authority to extend the Act's provisions to states at all. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312-313 (1976).

initially held that the ADEA does not contain a comprehensive remedial scheme and thus, resort to the judicially created *Ex Parte Young* remedy was not foreclosed. *(Appendix E at 57).*

Petitioner filed a motion for rehearing asserting the supreme court's error in concluding that the ADEA did not provide the exclusive remedy for its violation. The supreme court then issued a "substitute opinion" which concluded that the ADEA did contain a comprehensive remedial scheme. *(Appendix A at 12).* Despite this conclusion, the supreme court maintained that *Ex Parte Young* suit to enforce the ADEA was permissible because Respondent had "complied with these remedial procedures by first filing with the EEOC . . ." and, thus, " . . . any injunctive relief Gill might obtain would be consistent with the comprehensive remedial scheme contemplated in the ADEA." *(Appendix A at 12).* The court did not address the Act's enforcement scheme post-administrative remedy or the consistency or lack thereof between it and *Ex Parte Young* relief.

Petitioner again moved for rehearing, pointing out this Court's holding in *Seminole Tribe v. Florida,* 517 U.S. 44 (1996), arguing that *Ex Parte Young* suit could not be substituted for the congressionally mandated remedial scheme contained in federal statutes such as the ADEA and that the remedies available under *Ex Parte Young* were inconsistent with those available under the ADEA. The court denied Petitioner's motion for rehearing on the supreme court's substituted opinion on May 20, 2004.[3] The

[3] The court record contains a denial of the motion for rehearing on the substituted opinion dated May 7, 2004. *(Appendix H at 81).* However, Petitioner's motion for rehearing on the substituted opinion

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issuance of the New Mexico Supreme Court's mandate is stayed pending this Court's disposition of Petitioner's petition for certiorari. *(Appendix F at 77).*

REASON FOR GRANTING THE WRIT

I. The Court should grant the petition to resolve a conflict between applicable decisions of this Court and the federal Courts of Appeals and the decision of the New Mexico Supreme Court that the *Ex Parte Young* fiction may be used to sue state officials for violations of the ADEA despite the ADEA's comprehensive remedial scheme.

The decision of the New Mexico court eviscerates this Court's recent jurisprudence recognizing the states' sovereign immunity to claims arising under certain federal statutes that Congress has extended to the states pursuant to its Fourteenth Amendment power and ignores the effect of the ADEA's comprehensive remedial scheme on the availability of *Ex Parte Young* relief against state officials.

Ex Parte Young actions employ a fiction – that the state official sued in his or her official capacity is stripped of the state's Eleventh Amendment immunity, when a continuing violation of federal law is alleged, in order to maintain the supremacy of federal law. *See Idaho v. Coeur*

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had not yet been filed on that date. It is believed that the court intended to deny Petitioner's motion for extension to file the second motion for rehearing, which motion was filed on May 4, 2004. The motion for rehearing on the substituted opinion was filed on May 13, 2004 and denied on May 20, 2004. *(Appendix I at 83).*

d'Alene Tribe of Idaho, 526 U.S. 261, 289 (1997). The New Mexico court's decision, that individuals may enforce the ADEA against a State by suit against state officials for prospective injunctive relief, flies in the face of the limitations imposed by this Court on suits against the states under the ADEA and on *Ex Parte Young* actions for federal statutory violations.

In *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000), this Court dismissed plaintiffs' claims for damages and for "declaratory and injunctive relief" against state employers, holding, " . . . Congress did not validly abrogate the states' sovereign immunity to suit by private individuals." *Id.* at 91. In *Seminole*, this Court held:

> The narrow exception to the Eleventh Amendment provided by the *Ex Parte Young* doctrine cannot be used to enforce [the Indian Gaming Regulatory Act] because Congress enacted a remedial scheme . . . specifically designed for the enforcement of that right.

Seminole Tribe at 76.

Allowing *Ex Parte Young* actions against state officials, where the State itself is immune from suit, potentially subjects the State to far more ruinous raids on the State's treasury[4] than this Court prohibited in *Kimel v.*

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[4] Under the New Mexico court's holding, a state official sued under *Ex Parte Young*, and ultimately a State, may be required to pay out years of benefits to volunteer retirees so long as those monies are denominated as "prospective injunctive relief" despite the fact that the State is immune from ADEA suit for damages and injunctive and declaratory relief. *See generally* PAMELA S. KARLAN, THE IRONY OF IMMUNITY: THE ELEVENTH AMENDMENT, IRREPARABLE INJURY, AND SECTION 1983, 53 STAN.L.REV. 1311, 1314 (2001).

Florida Bd. of Regents, 528 U.S. 62 (2000) and to far more broad reaching enforcement mechanisms than those available in the ADEA.[5] *See, e.g., Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 74-75 (1996) (contrasting the sanctions available against the State under the Indian Gaming Regulatory Act with those available under *Ex Parte Young*). *Seminole* declined to allow *Ex Parte Young* actions to enforce federal statutes which, like the ADEA, do not expressly provide for relief against state officials. *Seminole* at 75, n. 17.

This Court's reinvigoration of the states' dual sovereignty within the federal system is grounded on a recognition of the states' constitutional sovereign immunity to claims brought pursuant to certain federal statutes. In ruling that Congress has no authority to extend the ADEA to the States (*see Kimel* at 91) and, at the very least, no authority to abrogate the states' immunity to suit for age discrimination, the Court could not have intended to leave the States vulnerable to a far greater liability by the simple device of naming a state official as the nominal defendant in suits asserting violations of the Act.

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[5] For example, the ADEA does not include state officials in its definition of "employers" who may be sued under the Act. *(See Appendix J at 89)*; *see also Swanson v. Dept. of Health, State of Colorado,* 773 F.Supp. 255, 258 (D. Colo. 1991) (individual state officials not ADEA employers); accord *Pierce v. Philadelphia Housing Authority,* 1995 WL 447614, *2 (there is general agreement that agents of state agencies are not "employers" within the meaning of the ADEA). In addition to its comprehensive administrative exhaustion requirements and its own limitations on judicial relief, the Act incorporates additional remedies contained in the Fair Labor Standards Act (*e.g.*, 29 U.S.C. §§ 211, 216 and 217) which contains its own comprehensive remedial scheme precluding *Ex Parte Young* relief. *See Bergemann v. State of Rhode Island,* 958 F.Supp. 61, 69 (D.R.I. 1997); *Mulverhill v. State of New York,* 1997 WL 394817, *8 (N.D.N.Y.).

Had the Court intended to allow *Ex Parte Young* actions to uniformly replace actions from which the Court has immunized the states, it would not have engaged in the significant constriction of *Ex Parte Young* suits ordained in *Idaho v. Coeur d'Alene Tribe,* 521 U.S. 261, 283 (1997) and, most particularly, in *Seminole Tribe,* 517 U.S. at 74. Nor would this Court and the federal circuit courts have consistently barred resort to *Ex Parte Young* actions against state officials as a mechanism to enforce federal statutes containing detailed remedies.[6] Since *Seminole*, this Court has not deviated from its holding that where Congress has created a comprehensive remedial scheme for enforcement of a right created by a federal statute, the *Ex Parte Young* remedy is not available. *See Verizon Maryland, Inc. v. Public Serv. Comm'n of Maryland,* 535 U.S. 635, 647 (2002). The federal Courts of Appeals have, uniformly, echoed this Court's holdings on this issue and this Court and the federal Courts of Appeals have uniformly applied its corollary – that a comprehensive remedial scheme also precludes relief against state officials sued in their individual capacities under 42 U.S.C. §§ 1983 and 1985.[7]

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[6] *Union Elec. Co. v. Missouri Dept. of Conservation,* 366 F.3d 655, 658 (8th Cir. 2004); *Rosie D. v. Swift,* 310 F.3d 230, 236 (1st Cir. 2002); *Joseph A. ex rel. Corrine Wolfe v. Ingram,* 275 F.3d 1253, 1262 (10th Cir. 2002).

[7] *See e.g., Schweiker v. Chiliky,* 487 U.S. 412, 423 (1988); *Middlesex County Sewage Auth. v. Nat'l Seaclammers Ass'n,* 453 U.S. 1, 20 (1981); *Great American Federal Savings and Loan Ass'n v. Novotny,* 442 U.S. 366, 375-76 (1979); *Vinson v. U.S.*, 288 F.3d 1145, 1155 (9th Cir. 2002); *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1011-1012 (8th Cir. 1999); *Lollar v. Baker*, 196 F.3d 603, 609-10 (5th Cir. 1999); *Sellers v. School Board of the City of Manassas*, 141 F.3d 524, 532 (4th Cir. 1998); *and*

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While the Supreme Court has not ruled on the specific issue of whether the ADEA's remedial scheme is sufficiently comprehensive to preclude judicially created relief, several federal circuit courts have determined that it is. The New Mexico court stands alone in holding that the comprehensive remedial scheme which the court acknowledges is contained in the ADEA, *Appendix A at 12,* does not foreclose other remedies against state or federal officials. In *Tapia-Tapia v. Potter*, 322 F.3d 742 (1st Cir. 2003), the First Circuit dismissed plaintiffs' *Bivens* action against individual federal officials for age discrimination holding, "[t]he ADEA provides the exclusive federal remedy for age discrimination in employment." *Id.* at 745.

In *Patterson v. Weinberger,* 644 F.2d 521, 524 (5th Cir. 1981), the Fifth Circuit affirmed the district court's dismissal of a federal employee's constitutional claim asserting age discrimination because of the detailed and comprehensive remedy contained in the statute,

> [B]y establishing the ADEA's comprehensive remedial scheme for resolution of employee complaints of age discrimination in federal employment, Congress clearly intended that all such claims of age discrimination be limited to the rights and procedures authorized by the Act . . . .

Id. at 524. In *Zombro v. Baltimore City Police Dept.,* 868 F.2d 1364 (4th Cir. 1989), the Fourth Circuit affirmed summary judgment for defendant on a 42 U.S.C. § 1983 claim asserting age discrimination in violation of the Fourteenth Amendment. After determining that plaintiff's

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Bruneau v. South Kortright Central School District, 163 F.3d 749, 756 (2nd Cir. 1998).

claims "fall within the scope of the specific and comprehensive administrative remedies provided by the Age Discrimination in Employment Act," *id.* at 1366, the court conducted a detailed review of the Act's remedies and concluded that "[t]he purposes and structure of the ADEA are inconsistent with the notion that the remedies it affords could be supplanted by alternative judicial relief." *Id.*; *accord Migneault v. Peck*, 158 F.3d 1131 (10th Cir. 1998) abrogated on other grounds by *Kimel v. Florida Bd. of Regents*, 528 U.S. 62; *Lafleur v. Tex. Dep't of Health*, 126 F.3d 758, 760 (5th Cir. 1997); *Chennareddy v. Bowsher*, 935 F.2d 315, 318 (D.C. Cir. 1991); *see also Causey v. Balog*, 929 F.Supp. 900, 912 (D.Md. 1996), *aff'd*, 162 F.3d 795 (4th Cir. 1998).

This Court and the federal Courts of Appeals have applied this same reasoning to foreclose § 1983 suits to enforce other federal anti-discrimination statutes with similar comprehensive administrative and judicial remedies. *See Brown v. General Services Admin.*, 425 U.S. 820, 835 (1976) ("Civil Rights Act . . . provides the exclusive judicial remedy for claims of discrimination in federal employment").[8] While these cases and the numerous other cases holding that the ADEA's comprehensive remedial scheme foreclosed § 1983 or *Bivens*' actions do not directly address the availability of *Ex Parte Young* to enforce rights created only by the ADEA, attempts to enforce federal statutes by resort to *Ex Parte Young* suits are unanimous

[8] *Smith v. Robinson*, 468 U.S. 992, 1009 (1984); *Vinson v. U.S.*, 288 F.3d 1145, 1156 (9th Cir. 2002); *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1011 (8th Cir. 1999); *Lollar v. Baker*, 196 F.3d 603, 609-610 (5th Cir. 1999); *Sellers v. School Bd. of City of Manassas*, 141 F.3d 524, 532 (4th Cir. 1998); *Bruneau v. South Kortright Central School Dist.*, 163 F.3d 749, 756 (2nd Cir. 1998).

in prohibiting such claims where the statute contains the sort of detailed remedy legislated in the ADEA. *See, e.g., Seminole Tribe; Union Electric Co. v. Missouri Dept. of Conservation,* 366 F.3d 655, 658 (8th Cir. 2004); *ANR Pipeline Co. v. Lafaver,* 150 F.3d 1178, 1191 (10th Cir. 1998); *Ponca Tribe of Oklahoma v. State of Oklahoma,* 89 F.3d 690, 691 (10th Cir. 1996).

The First Circuit, in *State Police for Automatic Retirement v. DiFava,* 317 F.3d 6 (1st Cir. 2003) did hold that private litigants could enforce the ADEA by an *Ex Parte Young* action against state officials. *DiFava*, however, actually concerned the court's refusal to dissolve an *Ex Parte Young* injunction against a state official previously obtained *by the EEOC*. Neither states nor their officials are immune from ADEA suits brought by the federal government. *See id.* at 12. Moreover, the *DiFava* court's statements demonstrate the First Circuit's erroneous conclusion that *Kimel* involved only a claim for monetary relief. *See id.* Most importantly, *DiFava* did not raise or address the effect of the ADEA's comprehensive remedial scheme on the availability of *Ex Parte Young* relief.

Petitioner believes that controlling United States Supreme Court precedent and significant federal appeals court holdings dictate that once it is demonstrated that a federal statute contains a comprehensive remedial scheme, *Ex Parte Young* relief is precluded. *See Schweiker v. Chiliky,* 487 U.S. at 423. Nor does *Seminole's* analysis of the limitations on *Ex Parte Young* relief require that the *Ex Parte Young* remedy be "inconsistent" with the statutory remedy. *See Rosie D. v. Swift,* 310 F.3d at 234-35. In rejecting this comparison approach, the *Rosie D.* court, consistent with *Seminole*, explained that the *Seminole* court's discussion of the nature and scope of the IGRA's

statutory remedy and the remedy available under *Ex Parte Young* was a tool to determine whether a comprehensive remedial scheme existed. The issue is not whether the statutory remedies are "consistent with" or "greater than" those available under *Ex Parte Young,* but rather whether the statute demonstrates a congressional intent to make the statutory remedy exclusive by clearly delineating the remedial methodology and relief available under the Act. *See id.* at 235-36.[9]

Even if consistency between the relief available under *Ex Parte Young* and the relief available under the ADEA was the issue, the consistency found by the New Mexico Supreme Court is illusory. *Ex parte Young* relief far exceeds and is incompatible with the relief Congress decreed should be available against "employers" under the Act.[10] The Act requires a preliminary filing with the EEOC and a panoply of administrative proceedings and opportunities to conciliate prior to resort to any judicial remedy. (*Appendix J at 86-89*). Without regard to Respondent's actions in this case, allowing *Ex Parte Young* relief to enforce federal statutory claims under the ADEA would enable private individuals to skip the administrative requirements for obtaining relief under the Act, altogether. Litigants would

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[9] " . . . [T]he nature and scope of the IGRA's remedial scheme was instrumental in the [*Seminole*] Court's ruling only to the extent that those attributes spoke to congressional intent. And in terms of that intent, the key factors in *Seminole Tribe* were the intricacy and detail of the statute's remedial scheme. [citation omitted]. In other words, it was the *comprehensiveness* of the remedial scheme that suggested an intention to pretermit *Ex parte Young* relief." [emphasis in the original]. *Id.* at 235.

[10] Even if Mr. Gill could overcome his volunteer status and the fact that he was never employed by the State, the individual officials of the PERB cannot be sued under the ADEA. *See* n. 5 *supra*.

also be able to avoid the Act's restrictions on employer-defendants and its limitations on relief in favor of a judicially created remedy which enforces the ADEA against the states without regard to the immunity recognized in *Kimel*, through the simple device of suing state officials.

CONCLUSION

For the reasons stated herein, Petitioner prays this Court to grant its petition for certiorari.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: ___

Filing Date: ___

NO. 27,823

JAMES GILL,

Plaintiff-Petitioner,

vs.

PUBLIC EMPLOYEES RETIREMENT BOARD of the PUBLIC EMPLOYEES RETIREMENT ASSOCIATION OF NEW MEXICO,

Defendant-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Carol Vigil, District Judge

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Hazen H. Hammel
Albuquerque, NM

for Petitioner

Hinkle, Hensley, Shanor & Martin, L.L.P.
Ellen Casey
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for Respondent

OPINION

(Filed Apr. 28, 2004)

BOSSON, Justice.

In *Cockrell v. Board of Regents of New Mexico State University,* 2002-NMSC-009, 132 N.M. 156, 45 P.3d 876, we acknowledged New Mexico's constitutional sovereign immunity, derived from both the federal Constitution and recent U.S. Supreme Court precedent. We continue to clarify the contours of that immunity by defining the limited circumstances under which a state official may be sued for prospective, injunctive relief. Consistent with federal law and our obligations as a state under the federalist compact, we apply the doctrine of *Ex parte Young* to such actions as a limited exception to constitutional sovereign immunity. *See Ex parte Young,* 209 U.S. 123 (1908).

BACKGROUND

In 1974, at the age of 49, James Gill joined the Hondo Volunteer Fire Department as a charter member. During his tenure, Gill served as an engineer, fireman, and Chief of the Department, and enjoyed all the benefits received by active members of the Department. After his retirement in February 1997, Gill applied for retirement benefits of $100 a month, based on his 22 years of service. *See* NMSA 1978, § 10-11A-5(B) (1983) (describing eligibility for retirement annuity). Shortly thereafter, the Public Employees Retirement Board (PERB), a state agency acting as the trustee for the various retirement funds handled by the Public Employees Retirement Association of New Mexico (PERA), denied Gill's claim for benefits, stating:

> Because you were over the age of 45 in 1979, the year in which you first could have acquired a service credit, YOU DO NOT QUALIFY to be a member and therefore, do not qualify for the benefits under the Volunteer Firefighters Retirement Act.

The Volunteer Firefighters Retirement Act (VFRA) straightforwardly defines an eligible "member" as a volunteer firefighter whose first year of service credit was accumulated "no later than the year which he attained the age of forty-five." NMSA 1978, § 10-11A-2(E) (1983, amended 2003). Although the New Mexico legislature has amended Section 10-11A-2(E) (2003) to apply to volunteer firefighters whose first year of service credit was accumulated during or after the year the firefighter attained the age of 16, Gill's claim is not moot because the amended statute refers to "an active member on the rolls of a fire department" and makes no mention of retroactive effect. "[T]he general rule is that statutes apply prospectively unless the [l]egislature manifests clear intent to the contrary." *Gallegos v. Pueblo of Tesuque,* 2002-NMSC-012, ¶ 33, 132 N.M. 207, 46 P.3d 668. As a result, the amended statute does not apply to current retirees, such as Gill.

Gill filed charges with the Equal Employment Opportunity Commission (EEOC) and New Mexico Human Rights Division, and received a "Right to Sue" notice from the EEOC on February 28, 2000. Gill filed this lawsuit *pro se* and later retained counsel. Gill claims that Section 10-11A-2(E) of the VFRA violates the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (2000), which prohibits arbitrary discrimination against employees who are at least 40 years old, based solely on age. *See* §§ 623(a), 631(a). Gill sued PERB for declaratory

relief, and an injunction that would require PERB to discontinue enforcement of Section 10-11A-2(E), the statutory provision declaring him ineligible for retirement benefits based upon his age. In response to Gill's complaint, PERB filed a motion to dismiss asserting sovereign immunity, and Gill filed a cross motion for summary judgment. The district court agreed with PERB and granted its motion to dismiss. The Court of Appeals affirmed, holding that the state had not waived its constitutional sovereign immunity, and PERB, as a state agency, was immune from suit. *Gill v. Pub. Employees Ret. Bd.*, 2003-NMCA-038, ¶ 8, 133 N.M. 345, 62 P.3d 1227. The Court of Appeals rejected Gill's two principal theories: (1) that New Mexico's Declaratory Judgment Act, NMSA 1978, §§ 44-6-1 to -15 (1975, as amended through 2003), constituted a waiver of state sovereign immunity, and (2) that state courts can apply the *Ex parte Young* doctrine as a limited exception to state constitutional sovereign immunity so as to afford aggrieved citizens prospective equitable relief against state officials and curtail the violation of federal law. We agree with the Court of Appeals on the first point. However, for the reasons discussed below, we disagree with the Court of Appeals on its rejection of the *Ex parte Young* doctrine, which we regard as an important constitutional component to New Mexico's relationship with the United States Congress.

DISCUSSION

Federalism and State Constitutional Sovereign Immunity

The subject of federalism, and specifically the balance between the powers of our national government and the powers of the several states, has been a source of debate

throughout our nation's history. Recently, the United States Supreme Court has charted a new course, altering the federalist balance to extend the doctrine of state constitutional sovereign immunity and limit the power of Congress to abrogate, or override, that immunity. *See* Erwin Chemerinsky, *The Federalism Revolution,* 31 N.M. L. Rev. 7 (2001); Daan Braveman, *Enforcement of Federal Rights Against States: Alden and Federalism Non-Sense,* 49 Am. U.L. Rev. 611 (2000); *see also* U.S. Const. amend. XI.

In its seminal opinion, *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996), the Supreme Court held that Congress can only authorize suits against non-consenting states when acting within its power under Section 5 of the Fourteenth Amendment, not under another source of constitutional authority such as the Commerce Clause. Section 5 of the Fourteenth Amendment contains an express grant of power authorizing Congress to enforce the Constitution "by appropriate legislation."

Since that time, the Court has determined that a number of valid federal statutes could not be enforced against states, absent their consent, because Congress exceeded its power under Section 5 of the Fourteenth Amendment. For example, the Supreme Court determined that the ADEA, the statute at issue in this case, did not validly abrogate the states' constitutional sovereign immunity from suit so as to permit an aggrieved individual to enforce that statute against a state agency. *See Kimel v. Fla. Bd. of Regents,* 528 U.S. 62 (2000) (holding that Congress exceeded its Fourteenth Amendment, § 5 authority, in enacting the enforcement provisions of the ADEA). Accordingly, we start from the undeniable premise that, absent their consent, states may not be sued by

private individuals in federal court to enforce rights granted them under the ADEA. *See also, e.g., Bd. of Trustees of the Univ. of Ala. v. Garrett,* 531 U.S. 356 (2001) (holding that Congress exceeded its Fourteenth Amendment, § 5 authority, by enacting the enforcement provisions of the Americans with Disabilities Act (ADA) to be applicable against the states).

The Supreme Court has expanded the scope of state constitutional sovereign immunity to include such claims filed in state, as well as federal court. In *Alden v. Maine,* 527 U.S. 706, 711 (1999), probation officers filed a claim for overtime wages and damages against their state employer, pursuant to the federal Fair Labor Standards Act (FLSA). *See also* 29 U.S.C. §§ 201-219 (2000). The action against the state, initially brought in federal court, was dismissed after a determination that the FLSA did not abrogate the state's constitutional sovereign immunity. *Alden,* 527 U.S. at 712. The probation officers then filed the same action in state court. *Id.* For the first time, the Supreme Court held that Congress also lacked the authority to subject a non-consenting state to an FLSA claim brought in state court. *Id.*

Limitations on the State Constitutional Sovereign Immunity Recognized in *Alden*

Although *Alden* expanded the doctrine of constitutional state sovereign immunity to actions in state courts, the United States Supreme Court limited the scope of that immunity and its exceptions. For example, a state may be sued when it consents to suit. Additionally, citizens may sue an entity that is not considered an "arm of the state." *Alden,* 527 U.S. at 756. Thirdly, aggrieved citizens may sue

state officers for prospective, injunctive relief through the *Ex parte Young* doctrine. *Id.* at 747.

These three exceptions to state constitutional sovereign immunity describe limited circumstances under which, in the opinion of the United States Supreme Court, a federal statutory claim does not unduly encroach upon a state's autonomy or core sovereign interests. Thus, when the facts no longer support the very reason for constitutional sovereign immunity, then the doctrine must give way and state courts must allow claims to proceed in deference to federal law and the Supremacy Clause of the United States Constitution. "The principle of sovereign immunity as reflected in our jurisprudence strikes the proper balance between the supremacy of federal law and the separate sovereignty of the states." *Alden,* 527 U.S. at 757; *see also* U.S. Const. art. VI, § 2 (Supremacy Clause). Although entitled to the immunity necessary to preserve their autonomy as separate sovereigns, states are bound to recognize the supremacy of the United States Constitution. "The good faith of the States thus provides an important assurance that '[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.'" *Alden,* 527 U.S. at 755 (*quoting* U.S. Const. art. VI). Thus, under the federalist compact, the obligation of states to respect federal law and rights created thereunder is an essential corollary of state sovereignty. *See Cockrell,* 2002-NMSC-009, ¶ 27 (acknowledging the state's duty to comply with federal law). "Even the most ardent advocate of federalism rejects the idea that states should be free to ignore or undercut constitutionally guaranteed individual liberties." Calvin Massey, *Federalism and the Rehnquist Court,* 53 Hastings L.J. 431, 440 (2002); *see also* Laura S. Fitzgerald,

Suspecting the States: Supreme Court Review of State-court State-law Judgments, 101 Mich. L. Rev. 80, 81 (2002) (asserting that federal courts must now presume that state courts can be trusted to respect and apply federal law).

As noted above, one important limitation on sovereign immunity is a state's clear and unambiguous consent to suit. *See Cockrell,* 2002-NMSC-009, ¶ 24; *see also Alden,* 527 U.S. at 755-56 (discussing how states have consented, through the ratification of the Constitution, to suits brought by the federal government or by other states). In this case, Gill contends that New Mexico waived its sovereign immunity by enacting the Declaratory Judgment Act, which states that "the state of New Mexico, or any official thereof, may be sued and declaratory judgment entered when the rights, status or other legal relations of the parties call for a construction of the constitution of the state of New Mexico, the constitution of the United States or any of the laws of the state of New Mexico or the United States, or any statute thereof." Section 44-6-13. Gill's argument does not persuade us just as it did not persuade the Court of Appeals. The Declaratory Judgment Act does not have the effect of general consent to be sued; it merely permits parties to sue the state when the state's consent to be sued otherwise exists. *See In re Bogert's Will,* 64 N.M. 438, 443, 329 P.2d 1023, 1026 (1958). We see no reason to revisit that well-established New Mexico law regarding the Declaratory Judgment Act.

The Significance of the *Ex parte Young* Doctrine

The *Alden* exception most important to our analysis of Gill's claim is *Ex parte Young,* which permits certain suits

against state officers, but only for prospective injunctive or declaratory relief, or for monetary relief that is not sought from the state treasury. *See Alden,* 527 U.S. at 756-57 (citing *Ex parte Young,* 209 U.S. at 159-60). Our Court of Appeals rejected Gill's *Ex parte Young* claim based on its understanding of the Supreme Court holding in *Kimel,* that Congress lacked the authority to abrogate state constitutional sovereign immunity through the ADEA. *Kimel,* 528 U.S. at 91; *see Gill,* 2003-NMCA-038, ¶ 12.

According to the Court of Appeals, "[i]f the purpose of the *Ex parte Young* doctrine is to ensure the Constitution's supremacy, then a congressional act that is constitutionally outside of Congress's power to enact as against the states should not be permitted to be enforced against the states in any way, either in state or federal court." *Gill,* 2003-NMCA-038, ¶ 12. We respectfully disagree. The Court of Appeals' analysis of the *Ex parte Young* doctrine directly conflicts with *Alden* and *Cockrell.* If left intact, that analysis would inappropriately extend our state constitutional sovereign immunity beyond what is necessary to protect New Mexico's core sovereign interests, and beyond the bounds of "good faith" and the federalist compact, as described by the United States Supreme Court in *Alden* and by this Court in *Cockrell,* 2002-NMSC-009, ¶ 28 ("[C]onstitutional sovereign immunity 'does not bar certain actions against state officers for injunctive or declaratory relief.'") (quoting *Alden,* 527 U.S. at 757).

Although a state's constitutional sovereign immunity prevents individual enforcement of certain federal statutes against a state, such as the FLSA claims at issue in *Alden* and *Cockrell,* that immunity does not undermine the basic *validity* of the legislation. Federal statutes enacted by Congress under its constitutional authority remain valid

and in effect, even if they may not be enforced in all instances and against all defendants. *See Cockrell,* 2002-NMSC-009, ¶¶ 27-28 (noting that the application of constitutional sovereign immunity may sometimes result in federal rights without remedies); *Seminole Tribe,* 517 U.S. at 72. Although the Supreme Court held in *Kimel,* 528 U.S. at 78, that individuals may not bring ADEA suits against states, the Court did not invalidate the ADEA or declare it unconstitutional.

The ADEA was duly enacted under Congress' Commerce Clause authority. *See id.* States are subject to suit by the federal government for noncompliance. *Garrett,* 531 U.S. at 374. Individuals are subject to suit for damages under the ADEA. It remains valid legislation. *Kimel* did not overrule this authority, as we discussed in *Cockrell,* 2002-NMSC-009, ¶ 27 ("[T]he state is bound by the substantive provisions of the FLSA and is not free to disregard its obligations under federal law."). The only remaining question is what remedy is available when state officials violate federal law. We find nothing in *Alden, Kimel,* or *Cockrell* to support the Court of Appeals' conclusion that all ADEA claims are barred by state constitutional sovereign immunity, especially when they may fall into one of the limitations or exceptions recognized in *Alden.* This is particularly true of the *Ex parte Young* doctrine.

Ex parte Young's Origins

In 1908, the United States Supreme Court held in *Ex parte Young,* 209 U.S. at 159-60 that the Eleventh Amendment generally does not preclude a suit brought against a state official in federal court for prospective

equitable relief, even when the state is otherwise immune from suit. This doctrine, which the federal courts have applied for nearly a century, provides "a powerful tool for ensuring state compliance with federal law," without undue encroachment on state sovereignty. *Elephant Butte Irrigation Dist. v. Dep't of Interior,* 160 F.3d 602, 608 (10th Cir. 1998).

Ex parte Young claims were originally conceived as an essential tool for ensuring that constitutional guarantees would be enforced. *Alden* emphasized the importance of this exception to preserving the balance between state autonomy and the enforcement of constitutional rights:

> In particular, the exception to our sovereign immunity doctrine recognized in *Ex parte Young* is based in part on the premise that sovereign immunity bars relief against States and their officers in both state and federal courts, and that certain suits for declaratory or injunctive relief against state officers must therefore be permitted if the Constitution is to remain the supreme law of the land.

Alden, 527 U.S. at 747 (citation omitted).

In 1997, the Supreme Court narrowed the *Ex parte Young* doctrine to exclude certain actions for prospective equitable relief against state officials that would impinge upon special sovereign interests. *Idaho v. Coeur d'Alene Tribe,* 521 U.S. 261, 283 (1997) (holding that the state had a unique sovereign interest in submerged land within its borders, and therefore state officials could not be sued even under *Ex parte Young*). The previous year, in *Seminole Tribe,* 517 U.S. at 74, the Supreme Court also held that an *Ex parte Young* suit against state officers was impermissible because the federal Indian Gaming Regulatory Act

contained its own comprehensive, and exclusive, enforcement mechanisms.

With these limited exceptions in mind, *Ex parte Young* retains its full vitality. Just last year, in *Verizon Maryland, Inc. v. Public Service Commission,* 535 U.S. 635 (2002), the Supreme Court allowed an *Ex parte Young* action under the federal Telecommunications Act. Distinguishing the Indian Gaming Regulatory Act, the Court noted that the Telecommunications Act does not contain a "detailed and exclusive remedial scheme like the one in *Seminole Tribe.*" *Verizon,* 535 U.S. at 647. The remedial scheme included in the ADEA, however, is comprehensive. *See* 29 U.S.C. § 626; *Zombro v. Baltimore City Police Dep't,* 868 F.2d 1364, 1366 (4th Cir. 1989). The ADEA requires that individuals seeking redress for age discrimination in the workplace must first file charges with the EEOC. Gill complied with these remedial procedures by first filing with the EEOC, and filing suit after receiving a "Right to Sue" notice from the EEOC. Therefore, any injunctive relief Gill might obtain would be consistent with the comprehensive remedial scheme contemplated in the ADEA. Also, as we shall discuss shortly, prospective relief in the case at bar would not impinge upon core sovereign interests, of the kind discussed in *Coeur d'Alene Tribe,* 521 U.S. at 283.

The *Ex parte Young* Doctrine Endures as an Exception to State Sovereign Immunity

In *Kimel,* the Supreme Court did not expressly address the viability of injunctive relief to enforce the ADEA. But the Court subsequently spoke on the same subject, and clarified that the lack of a remedy for damages due to

sovereign immunity and the Eleventh Amendment did not invalidate the ADEA as applied to the states. In *Garrett,* 531 U.S. at 356, state employees sued the university board of trustees under the ADA for failure to accommodate the disabled. Just as with the ADEA in *Kimel,* the Court found that the abrogation of sovereign immunity from suit under the ADA was not enacted pursuant to a valid exercise of the congressional power afforded in Section 5 of the Fourteenth Amendment. However, the Court explicitly stated that despite the failure of the law to abrogate constitutional sovereign immunity, *Ex parte Young* still offers a viable route for relief against the state for injunctive relief to enforce the law.

> Congress is the final authority as to desirable public policy, but in order to authorize private individuals to recover *money damages* against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation. Those requirements are not met here, and to uphold the Act's application to the States would allow Congress to rewrite the Fourteenth Amendment law laid down by this Court in *Cleburne*.

Garrett, 531 U.S. at 374. In a footnote, the court then stated:

> Our holding here that Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no federal recourse against discrimination. *Title I of the ADA still prescribes standards applicable to the States. Those standards can be*

> *enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under Ex parte Young* . . . In addition, state laws protecting the rights of persons with disabilities in employment and other aspects of life provide independent avenues of redress.

Id. at 374 n.9 (emphasis added).

This passage clarifies what had been left open in *Kimel*: that *Ex parte Young* remains a viable action for injunctive relief when damages are not available because Congress has failed to abrogate States' immunity under Section 5 of the Fourteenth Amendment. It also emphasizes that federal laws like the ADEA and ADA remain applicable to the states, even though states are not subject to suit for money damages under these laws. Thus, as we have previously stated, the Court of Appeals' conclusion in Gill's case that Congress lacked the power to make the ADEA applicable to the states is incorrect as a matter of constitutional law. *See Frew ex rel. Frew v. Hawkins,* 124 S. Ct. 899 (2004) (upholding *Ex parte Young* prospective relief against state officers to vindicate federal law even though state sovereign immunity would preclude retrospective relief for money damages).

The effect of Congress' failure to abrogate state sovereign immunity in the context of the ADEA was recently discussed in *State Police for Automatic Retirement Association v. DiFava,* 317 F.3d 6 (1st Cir. 2003). In *DiFava,* a Massachusetts law substantially lowered the mandatory retirement age for certain police officers. *Id.* at 8. In an appeal from a preliminary injunction preventing the state from forcing police officers to retire, the court addressed whether the ADEA remains applicable to the

states after *Kimel,* the very question our Court of Appeals answered in the negative in regard to Gill. *DiFava,* 317 F.3d at 8. The *DiFava* court expressly rejected the contention that *Kimel* rendered the ADEA inapplicable to states, and upheld an injunction under *Ex parte Young* for prospective relief under the ADEA. *DiFava,* 317 F.3d at 11-12.

DiFava also reinforced the understanding that the traditional exceptions to sovereign immunity continue in effect, even under federal legislation that fails to satisfy Section 5 of the Fourteenth Amendment. 317 F.3d at 12. "The Eleventh Amendment . . . does not confer upon the states a total immunity against suit." *Id.*; *Alden,* 527 U.S. at 755. Therefore, legislation that does not satisfy Section 5 may nevertheless be enforceable against the states in other ways. In *Cockrell* this Court described several alternative forms of recourse available to plaintiffs despite the existence of constitutional sovereign immunity, including "certain actions against state officers for injunctive or declaratory relief." 2002-NMSC-009, ¶ 28 (quoting *Alden,* 527 U.S. at 757). No heightened immunity is bestowed upon states by virtue of a finding that Congress cannot abrogate state immunity in a given statute. Instead, states maintain the same degree of immunity from suit by private individuals seeking money damages. This immunity is subject to certain exceptions and limitations, such as state consent to suit, or enforcement of the act through an action initiated by the United States, or an equitable action under *Ex parte Young.*

Ex parte Young Applies in State Court

DiFava and *Garrett* applied *Ex parte Young* in federal court, not state court. *Alden* confirms that *Ex parte Young*

also applies in state courts. In restating that *Ex parte Young* applies in state courts, an idea first articulated nearly 100 years ago in *General Oil Co. v. Crain,* 209 U.S. 211 (1908), the *Alden* Court described the importance of maintaining the *Ex parte Young* doctrine:

> In particular, the exception to our sovereign immunity doctrine recognized in *Ex parte Young* is based in part on the premise that sovereign immunity bars relief against States and their officers *in both state and federal courts,* and that certain suits for declaratory or injunctive relief against state officers must therefore be permitted if the Constitution is to remain the supreme law of the land.

Alden, 527 U.S. at 747 (emphasis added). *Alden* goes on to state, "[h]ad we not understood the States to retain a constitutional immunity from suit in their own courts, the need for the *Ex parte Young* rule would have been less pressing, and the rule would not have formed so essential a part of our sovereign immunity doctrine." *Id.* at 748 (citing *Coeur d'Alene,* 521 U.S. at 270-71).

Limited exceptions to sovereign immunity are needed to maintain pathways for individuals who have suffered damages due to violations of federal law by state officials. The use of the *Ex parte Young* fiction is an attempt to strike a balance between respect for the dignity and autonomy of the state, and the need to maintain the supremacy of federal law. Encroachment into state autonomy is minimized, while valid federal law maintains a meaningful presence within state government. Several post-*Alden* state cases confirm that *Ex parte Young* is available in state court as an exception to sovereign immunity. *See Middleton v. Hartman,* 45 P.3d 721, 727

(Colo. 2002) (citing *Ex parte Young* as one of six exceptions to the doctrine of sovereign immunity, the court held that because the state would not be liable for damages, except for those damages it had voluntarily assumed, a suit for prospective injunctive relief was not barred by constitutional sovereign immunity); *Purvis v. Williams,* 73 P.3d 740, 749 (Kan. 2003) (stating that an *Ex parte Young* suit for prospective injunctive relief is one of "three ways state immunity may be relinquished" in Kansas); *see also Connelly v. State Highway Patrol,* 26 P.3d 1246, 1259 (Kan. 2001); *Prager v. State Dep't of Revenue,* 20 P.3d 39, 55 (Kan. 2001); *Brown v. Div. of Motor Vehicles,* 573 S.E.2d 246 (N.C. Ct. App. 2002) (acknowledging the availability of an *Ex parte Young* action brought under the ADA in state court).

We hold that the *Ex parte Young* doctrine does apply to suits brought in New Mexico state courts to enforce rights validly created under federal law. We now turn to the procedural requirements of this doctrine: (1) the plaintiff must allege an ongoing violation of federal law; (2) the suit must not implicate special state sovereignty interests; (3) the relief sought must be prospective and injunctive; (4) the suit must be directed at officers of the state, and not the state itself.

The Alleged Conduct Violated Federal Law

According to a recent U.S. Supreme Court opinion, "[i]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry' into whether [the] complaint alleges an ongoing violation of federal law . . . " *Verizon,* 535 U.S. at 645 (explaining that the inquiry into

whether suit lies under *Ex parte Young* does not include analyzing the merits of the claim) (internal quotation marks and citation omitted). Because the ADEA remains applicable to the states, the straightforward inquiry described in *Verizon* applies in this case. To make a prima facie showing of an ADEA violation, Gill must establish that he was treated adversely in his employment because of his age, and that he was at least 40 years of age at the time of the alleged discrimination. *See* 29 U.S.C. §§ 623, 631(a). Pursuant to Section 10-11A-2(E) (prior to 2003 amendment), Gill was denied retirement benefits based solely on his age. The district court granted PERB's motion to dismiss based on constitutional sovereign immunity, without reaching the merits of the complaint. We are satisfied that Gill's complaint, on its face, sufficiently alleges an ongoing violation of the ADEA.

The Suit Must Not Implicate Special State Sovereignty Interests

Even if a party brings an otherwise appropriate *Ex parte Young* action, constitutional state sovereign immunity can still bar suit if the requested relief is "far reaching and intrusive" on core state functions or "an impermissible affront" to the state's political authority. *Elephant Butte,* 160 F.3d at 612-13; *Coeur d'Alene Tribe,* 521 U.S. at 281-83. Two federal cases have used the special sovereign interests criteria to carve out specific exceptions to the *Ex parte Young* doctrine. In *Coeur d'Alene Tribe,* 521 U.S. at 281-83, -87, the Supreme Court ruled that a state's interest in its submerged lands was a sufficiently special state sovereign interest to bar an *Ex parte Young* action. In *ANR Pipeline Co. v. LaFaver,* 150 F.3d 1178, 1194 (10th Cir. 1998), the Tenth Circuit found a state's property tax

scheme to be a sufficiently special state sovereign interest to bar relief. More recently, the Tenth Circuit has explained that the *Coeur d'Alene Tribe* and *ANR Pipeline* reflect extreme and unusual cases in which relief may be denied because of "particular and special circumstances" that affect "special sovereignty interests" and cause "offense to [the state's] sovereign immunity." *J.B. ex rel. Hart v. Valdez,* 186 F.3d 1280, 1286-87 (10th Cir. 1999).

Most *Ex parte Young* cases do not implicate core state functions, and therefore "[t]he interest of vindicating the federal rights and answering the federal questions involved substantially outweigh the state's sovereign interests." *Elephant Butte,* 160 F.3d at 613. Outside of land use and taxation, numerous cases have employed the *Ex parte Young* remedy in a variety of contexts, including management of social and educational programs, welfare distribution, management of trust lands, and the re-appropriation of surplus funds. *See, e.g., Joseph A. ex rel. Corrine Wolfe v. Ingram,* 275 F.3d 1253, 1260-61 (10th Cir. 2002) (holding that welfare distribution is not a core sovereign interest comparable to power to tax); *Harris v. Owens,* 264 F.3d 1282, 1293-94 (10th Cir. 2001) (holding that funds requested by plaintiff prior to their entry into the treasury was not the equivalent of an appropriations bill, and "[t]he state's interest with respect to these future funds is not related to appropriations but to revenue sources, an interest we have rejected as sufficiently special to serve as an exception to *Ex parte Young*"); *Lewis v. N.M. Dep't of Health,* 261 F.3d 970, 978 (10th Cir. 2001) (administration of Medicaid program is not core sovereign interest); *Ellis v. Univ. of Kan. Med. Ctr.,* 163 F.3d 1186 (10th Cir. 1998) (concluding that a limitation on state medical residency criteria for school admission is not a special sovereignty

interest and does not threaten existence of state government); *Branson Sch. Dist. RE-82 v. Romer,* 161 F.3d 619, 632 (10th Cir. 1998) (holding that the state has no special sovereign interests in managing lands held in trust).

We are not persuaded that Gill's ADEA claim presents an impermissible affront to New Mexico's special sovereign interests or its political autonomy. We observe that New Mexico created a state remedy for age discrimination through the New Mexico Human Rights Act that affords victims back wages and other monetary relief. *See* NMSA 1978, §§ 28-1-7(A), -2(A) (1993); *Elephant Butte,* 160 F.3d at 613. Gill's claim under *Ex parte Young,* being only for prospective, injunctive relief, may well have a lesser impact upon the state treasury than what the state has already authorized under state law.

The Relief Sought is Prospective and Injunctive

In oral argument before this Court, Gill conceded that under an *Ex parte Young* theory of relief, he could only seek an injunction to require payment of future retirement benefits, not retroactive damages for past benefits. This is an important distinction, both to the law and to the viability of Gill's claim. Nonetheless, PERB characterizes Gill's claim as "a direct raid on the state's treasury," and argues that monetary relief of any kind is not available under the *Ex parte Young* doctrine. We acknowledge that even injunctive relief may have some impact upon the state treasury. Under the leading precedent, however, the pertinent inquiry is not whether the relief will require the incidental payment of state funds, but whether the relief will remedy future rather than past wrongs. *See Elephant Butte,* 160 F.3d at 611.

Ex parte Young actions for prospective relief have been allowed, even when such an award would have a "substantial ancillary effect on the state treasury." *ANR Pipeline,* 150 F.3d at 1189; *see Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 96 (1984) (citing *Ex parte Young*). For example, in a case involving the denial of supplemental social security income benefits, the Tenth Circuit disallowed retroactive monetary reimbursement for federal benefits withheld by the state, but held that recipients could seek prospective injunctive relief against *future* withholdings. *Johns v. Stewart,* 57 F.3d 1544, 1553-55 (10th Cir. 1995). Although courts should be circumspect regarding requests for monetary relief in an *Ex parte Young* action, "relief that serves to directly bring about an end to a present violation of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect on the state treasury." *Harris,* 264 F.3d at 1291 (quoting *Papasan v. Allain,* 478 U.S. 265, 278 (1986)).

We also disagree that Gill's claim is a "raid on the state treasury." The Volunteer Firefighter's Retirement Fund (VFRF), which PERB oversees, and from which it would pay Gill's claim, is segregated from the state general fund and from all other state retirement funds. *See* NMSA 1978, § 10-11A-3 (1997) (forming a separate retirement fund allocated on a static basis). Furthermore, unlike other PERA funds, the VFRF is not appropriated on an actuarial basis. VFRF's appropriation in any subsequent year will remain unchanged, regardless of whether PERB is forced to provide Gill with benefits. In fact, the state is prohibited from reclaiming any surplus funds in the VFRF at the end of the fiscal year. *See* Section 10-11A-3(B) (1983), and 2002 supp. comment on "Appropriations";

cf. NMSA 1978, § 21-8-5 (1953), and 2000 supp. comment on "Appropriations" (providing that unexpended university funds shall revert to the general fund).

We conclude, therefore, that Gill is seeking permissible prospective, injunctive relief that would only have an ancillary effect on the state treasury. He is asking the court to enjoin future violations of the ADEA. If compliance with federal law also brings some financial benefit to Gill, that hardly constitutes an impermissible raid on the state treasury, such that we would turn a blind eye to Gill's predicament and New Mexico's constitutional obligation to comply with federal law. Speaking very recently, the United States Supreme Court reinforced the prospective versus retrospective relief distinction,

> The Eleventh Amendment confirms the sovereign status of the States by shielding them from suits by individuals absent their consent. To ensure the enforcement of federal law, however, the Eleventh Amendment permits suits for prospective injunctive relief against state officials acting in violation of federal law. This standard allows courts to order prospective relief, as well as measures ancillary to appropriate prospective relief. Federal courts may not award retrospective relief, for instance money damages or its equivalent, if the State invokes its immunity.

Frew, 124 S.Ct. at 903 (citations omitted).

The Proper Party Defendants

Traditionally, *Ex parte Young* suits name one or more individual state officers to be sued in their official capacities. *Verizon,* 535 U.S. at 645. The purpose of naming an individual officer in an *Ex parte Young* claim is to identify

the party whose conduct violated federal law, and more importantly to ensure that future conduct conforms to federal law. The focus of determining if an action fits into the *Ex parte Young* rubric is not simply the identity of the named party, but whether the State is the real party in interest and thus, whether a suit might intrude upon the sovereignty and autonomy of the State. It has been consistently noted that, "*Young*'s applicability 'is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record.'" *Coeur d'Alene,* 521 U.S. at 278 (Kennedy, J.) (quoting *In re State of New York,* 256 U.S. 490, 500 (1921)).

Mr. Gill's *Ex parte Young* action is directed towards PERB, not toward a state official or officials. *Elephant Butte,* 160 F.3d at 609. Instead, Mr. Gill appears to argue that, because PERB is made up of individuals, he need not name them as such, emphasizing that a majority of a quorum is necessary for a PERB decision. We disagree. The requirement that a plaintiff must sue a state official in an *Ex parte Young* claim remains an integral component of the *Ex parte Young* construct.

However, Gill may still move to amend his complaint pursuant to Rule 1-015(C) NMRA 2004. This rule permits an amendment to a party named in a suit to relate back to the date of the original pleading if the parties named in the amended pleading received notice of the action, and knew or should have known that, but for a mistake concerning the identities of the proper parties, the actions would have been brought against them originally. Rule 1-015(C). Because the individual members of the PERB apparently were on notice of this proceeding, and because the claim to be asserted in the amended pleading would

arise "out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading," Gill may move to amend his claim to add the individual members of the PERB. We therefore remand to the district court to allow Gill to move to amend his complaint pursuant to Rule 1-015 NMRA 2004.

CONCLUSION

For the reasons stated, we reverse the Court of Appeals and remand this case to the district court for further proceedings consistent with this opinion.

IT IS SO ORDERED.

/s/ Richard C. Bosson
RICHARD C. BOSSON, Justice

WE CONCUR:

/s/ Petra Jimenez Maes
PETRA JIMENEZ MAES, Chief Justice

/s/ Patricio M. Serna
PATRICIO M. SERNA, Justice

/s/ Edward L. Chavez
EDWARD L. CHAVEZ, Justice

PAMELA B. MINZNER, Justice (specially concurring)

MINZNER, Justice (specially concurring).

I concur in the majority opinion but write separately in order to emphasize the importance I place on the analysis in *Cockrell v. Board of Regents of New Mexico*

State University, 2002-NMSC-009, 132 N.M. 156, 45 P.3d 876, in reversing the Court of Appeals. Further, I believe the opinion of the Court of Appeals, as did the opinion in *Cockrell,* recognized an important anomaly within the body of case law we apply. I am persuaded that we adopted an approach in *Cockrell* we should continue to pursue.

In *Cockrell,* we discussed the effect of several opinions by the United States Supreme Court on issues of federalism. We concluded that these opinions have determined that each State enjoys a form of constitutional sovereign immunity, and this unique constitutional immunity precludes Congress from providing for enforcement against a state absent its consent. *Id.* ¶ 8. As we noted in *Cockrell,* however, the United States Supreme Court also indicated that a statute Congress may not make enforceable against a State, absent its consent, nevertheless can continue to be "binding on the States pursuant to the Supremacy Clause of Article VI of the Constitution." *Id.* ¶¶ 5, 27.

We specifically said in *Cockrell,*

> [W]e do not believe that it is within this Court's province to decide whether the State should subject itself to liability for a federal claim filed in state court. Under the principle of separation of powers embodied in Article III, Section 1 of the New Mexico Constitution, we believe this is a matter for the Legislature. Unlike the decision "to do away with common law principles," [*Hicks v. State,* 88 N.M. 588, 590, 544 P.2d 1153, 1155 (1975)], which is within this Court's power, the decision to waive this State's constitutional sovereign immunity would represent an alteration of the constitutional balance of power between the Federal Government and the State of New Mexico that

> was struck by the Supreme Court in *Alden [v. Maine,* 527 U.S. 706 (1999)].

Id. ¶ 13.

Our opinion in this case might appear inconsistent with this portion of *Cockrell.* In applying *Ex parte Young,* 209 U.S. 123 (1908) to the facts of this case, reversing both the trial court and the Court of Appeals, and recognizing a private enforcement claim, we may appear to be in effect exercising the Legislature's prerogative to determine when or under what circumstances New Mexico will permit itself to be sued in its own courts on a federal claim, notwithstanding the constitutional sovereign immunity the United States Supreme Court has so carefully and recently articulated. After all, we noted in the above passage that the United States Supreme Court had struck a balance of power between the Federal Government and the State of New Mexico, a balance that preserved the Legislature's power to waive the State's immunity and under the principle of separation of powers that is part of the New Mexico Constitution limited our own.

Cockrell itself seems to me to hold the answer to any apparent inconsistency. The constitutional sovereign immunity that the United States Supreme Court has articulated so recently is limited. We made this point in *Cockrell* several times. We said, for example: "[I]n the *limited context of a private action for money damages* authorized by a federal statute, 'the States do retain a *constitutional immunity* from suit in their own courts.'" 2002-NMSC-009, ¶ 11 (first emphasis added) (quoting *Alden,* 527 U.S. at 745). We also said: "This State, by virtue of its sovereign role in the Union, is constitutionally immune from *private suits for damages* under a federal

statute." *Id.* ¶ 15 (emphasis added). Finally, we said: "We hold that the State has not waived its constitutional sovereign immunity from *private suits for damages* based on a violation of federal law." *Id.* ¶ 29 (emphasis added).

Consequently, we have indicated our understanding that the Legislature's power to waive New Mexico's constitutional sovereign immunity is the power to decide whether to expose the State to liability for money damages for violations of federal law. Whether the doctrine of *Ex parte Young* applies is a decision that the Court explicitly and appropriately reserved for itself. In *Cockrell,* we stated:

> Despite the existence of the State's constitutional sovereign immunity, state employees who do not receive the benefits to which they are entitled under the FLSA are not without recourse. . . . [C]onstitutional sovereign immunity "does not bar certain actions against state officers for injunctive or declaratory relief."

2002-NMSC-009, ¶ 28 (quoting *Alden,* 527 U.S. at 757).

It does seem to me that in applying *Ex parte Young* to the facts of this case, we are extending an historic doctrine beyond its historic limits. *See generally* 1 Laurence H. Tribe, *American Constitutional Law* § 3-27, at 555-56 (3d ed. 2000). In the past, the doctrine of *Ex parte Young* has permitted suits in federal courts against individual state officers on the basis that when acting illegally, those officers should be viewed as stripped of the immunity they otherwise would enjoy as representatives of a sovereign state. *Id.* In this case, the Board acted, from its perspective, legally. The Board members certainly acted consistently with and in reliance on a state statute. In this case,

we in effect declare action taken pursuant to a state statute illegal, if it conflicts with a federal statute. As the majority opinion points out, we are not alone in recognizing that *Ex parte Young* can apply to an action taken in state courts. *Id.* ¶ 25. The most difficult question for me has been whether we ought to equate the Board's action with the conduct to which the *Ex parte Young* doctrine historically has applied, but I also have found it difficult to determine whether the claim asserted in this case is in fact a claim for prospective, injunctive relief within the scope of the doctrine. *See Gill v. Pub. Employees Ret. Bd.*, 2003-NMCA-038, ¶ 10, 133 N.M. 345, 62 P.3d 1227.

The Court of Appeals seems to me to make a valid point in suggesting the historical anomaly of relying on *Ex parte Young* to preserve the supremacy of federal law in a state court when some of the language in the federal cases suggests Congress lacked the power to make the law supreme or, put another way, that a state's constitutional sovereign immunity is an equally important principle of constitutional law, which inherently limits the reach of federal law. *See e.g. Kimel v. Fla. Bd. of Regents,* 528 U.S. 62 (2000). In *Kimel* the Court held "that the [Age Discrimination in Employment Act] is not a valid exercise of Congress' power under § 5 of the Fourteenth Amendment" and that therefore the "purported abrogation of the States' sovereign immunity is accordingly invalid." *Id.* at 91. If, by that language, the United States Supreme Court meant to say that Congress had the power to enact legislation that is binding on the States but not the power to make it enforceable, Congress' power must be limited, even if supreme. We noted this anomaly in *Cockrell.* There we said that "[w]e recognize[d] the incongruity of the State's obligation to pay overtime wages . . . without a concomitant method of

enforcement for employees." *Cockrell,* 2002-NMSC-009, ¶ 27.

The Court of Appeals opinion elegantly refers to the tension within the case law in a single sentence: "*If* the purpose of *Ex parte Young* doctrine is to ensure the Constitution's supremacy, then a congressional act that is constitutionally outside of Congress's power to enact as against the states should not be permitted to be enforced against the states in any way, either in state or federal court." *Gill,* 2003-NMCA-038, ¶ 12 (emphasis added). I understand the Court of Appeals to be observing, correctly, that *Ex parte Young* began as a protection of the supremacy of the United States Constitution. If the Constitution limited Congressional power to make federal legislation applicable to the states, then it *should* be the case (not necessarily *is* the case) that the *Ex parte Young* doctrine, a constitutional concept, would not be available to facilitate what Congress otherwise did not have the power under the Constitution to accomplish.

Again, I think *Cockrell* addresses and helps resolve what would otherwise be an unbearable tension. Because the constitutional sovereign immunity the United States Supreme Court has so recently articulated is limited to an immunity from money damages, and does not preclude suits for injunctive relief, Congress' power in enacting remedial legislation is not as limited as the language in *Kimel* suggests. Because State constitutional sovereign immunity is limited, Congress' power to enact remedial legislation can be understood to include the power to make that legislation enforceable in actions to which a State is not immune. For this reason, we ought not foreclose the suit before us on the basis of constitutional sovereign immunity. Having recognized the federal cases as articulating a

limited constitutional sovereign immunity, we are able to recognize the viability of the present claim. The federal statute on which this claim rests continues to have validity in state court, to the extent the State is not immune as a matter of federal constitutional law. The complaint stating the claim should not have been dismissed, because we should equate the Board's conduct with the conduct to which *Ex parte Young* historically applied.

Nevertheless, the balance to which we referred in *Cockrell* is a balance not only between Federal and State power but also between legislative and judicial power. If we are careful in applying *Ex parte Young,* we can respect the Legislature's exclusive power to waive the State's constitutional sovereign immunity without surrendering our own power to recognize the development of the *Ex parte Young* doctrine in an appropriate way. For the reasons stated in the majority opinion, I believe we are extending the *Ex parte Young* doctrine consistent with United States Supreme Court precedent, although injunctive relief can be every bit as onerous a burden on the state and its treasury as the potential exposure of the state to monetary damages. *See* Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983,* 53 Stan. L. Rev. 1311, 1314 (2001) (arguing that "injunctive relief may turn out to be far broader and more intrusive than the damages that would have been available after the fact, both because it may involve more invasive judicial supervision of state entities and because some of the defenses that would be available in after-the-fact-litigation, most notably qualified immunity, are unavailable in cases seeking prospective relief"). What has helped me distinguish this case from *Cockrell* is the existence of a separate fund against which

the claim has been made, making it possible to characterize the relief sought as prospective, injunctive relief, "that would only have an ancillary effect on the state treasury." Majority Op. ¶¶ 33, 34. In *Cockrell,* on the other hand, the plaintiff sought money damages for breach of a state statute, which I assume would not have had an ancillary effect on the state treasury. 2002-NMSC-009, ¶ 1. The distinctions we are making may seem thin, but the analysis that results from those distinctions is consistent with *Cockrell* and seems to permit us to reconcile conflicting language and ideas within the federal cases. On that basis, and on the basis of the analysis contained in the majority opinion, I concur.

/s/ Pamela B. Minzner
PAMELA B. MINZNER, Justice

APPENDIX B

FIRST JUDICIAL DISTRICT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

JAMES GILL,

Plaintiff,

vs.

PUBLIC EMPLOYEES RETIREMENT BOARD OF THE PUBLIC EMPLOYEES RETIREMENT ASSOCIATION OF NEW MEXICO,

No. D0101-CV-2000-01342

Defendant.

ORDER GRANTING PUBLIC EMPLOYEE RETIREMENT BOARD'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

THIS MATTER having come before the Court on Defendant, Public Employees Retirement Board's ("PERB's") Motion to Dismiss for Lack of Subject Matter Jurisdiction and the Court having reviewed the legal authority and argument submitted by PERB and by Plaintiff, James Gill, and having afforded the parties the opportunity to present oral argument on October 10, 2000, and being otherwise fully informed in the premises, finds that the Motion is well taken and shall be granted.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that Plaintiff's Complaint for Damages and/or

Equitable Relief for Age Discrimination is hereby dismissed in its entirety, with prejudice, pursuant to NMRA 2000 1-012(B)(1) for lack of subject matter jurisdiction.

IT IS SO ORDERED.

CAROL J. VIGIL
Honorable Carol J. Vigil
District Judge

Submitted by:

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APPENDIX C

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

Opinion Number _____

Filing Date: _____

Docket No. 21,818

JAMES GILL,

Plaintiff-Appellant,

vs.

PUBLIC EMPLOYEES RETIREMENT BOARD of the PUBLIC EMPLOYEES RETIREMENT ASSOCIATION OF NEW MEXICO,

Defendant-Appellee.

**APPEAL FROM THE DISTRICT COURT
OF SANTA FE COUNTY
Carol J. Vigil, District Judge**

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OPINION

(Filed Nov. 21, 2002)

PICKARD, Judge.

This case is a sequel to *Cockrell v. Board of Regents of New Mexico State University,* 2002-NMSC-009, 132 N.M. 156, 45 P.3d 876. There, the Supreme Court canvassed the authorities leading to *Alden v. Maine,* 527 U.S. 706 (1999), and held that constitutional sovereign immunity required dismissal of the plaintiff's suit to enforce his rights under the federal Fair Labor Standards Act because the New Mexico legislature had not specifically waived such immunity by statute. *Cockrell,* 2002-NMSC-009, ¶¶ 4-8, 11, 15, 24. Plaintiff here sued to enforce rights under the federal Age Discrimination in Employment Act (ADEA). Defendant had denied Plaintiff's, a volunteer firefighter's, claim for retirement benefits because the pertinent statute required him to be forty-five years of age or less when he first acquired service credit, and Plaintiff was fifty-four at that time. *See* NMSA 1978, § 10-11A-2(E) (1983). Plaintiff claims that the doctrine of sovereign immunity set forth in *Cockrell* and *Alden* does not apply because he sued under the New Mexico Declaratory Judgment Act, NMSA 1978, §§ 44-6-1 to -15 (1975), which waives such immunity, and because he can sue for declaratory and injunctive relief under the doctrine set forth in *Ex parte Young,* 209 U.S. 123 (1908). We disagree with Plaintiff's arguments and therefore affirm the dismissal of his suit.

Declaratory Judgment Act

Plaintiff states that "Section 44-6-13 of the Declaratory Judgment Act plainly waives state sovereign immunity[,]" citing *New Mexico Right to Choose/NARAL v.*

Johnson, 1999-NMSC-005, ¶ 23, 126 N.M. 788, 975 P.2d 841. In making this argument, however, Plaintiff has ignored a long history of jurisprudence under the Declaratory Judgment Act and has read *New Mexico Right to Choose / NARAL* entirely too broadly.

Section 44-6-13 states:

> For the purpose of the Declaratory Judgment Act . . . , the state of New Mexico, or any official thereof, may be sued and declaratory judgment entered when the rights, status or other legal relations of the parties call for a construction of the constitution of the state of New Mexico, the constitution of the United States or any of the laws of the state of New Mexico or the United States, or any statute thereof.

The predecessor statute to Section 44-6-13 read:

> "For the purpose of this act, the state of New Mexico, or any official thereof, may be sued and declaratory judgment entered when the rights, status or other legal relations of the parties call for a construction of the Constitution of the state of New Mexico, or any statute thereof."

In re Bogert's Will, 64 N.M. 438, 443, 329 P.2d 1023, 1026 (1958) (citation omitted). It can be readily seen that the only material difference between these sections of the 1975 Act and the earlier Act is that the 1975 version allows declaratory judgments to be entered on construction of federal, as well as state, law.

In *In re Bogert's Will,* the Court reiterated the rule established in *Taos County Board of Education v. Sedillo,* 44 N.M. 300, 307, 101 P.2d 1027, 1032 (1940), and stated,

> "We take this first opportunity to correct any impression that [what is now Section 44-6-13] is a general consent on the part of the state to be sued under its provisions. We are agreed that it has no such meaning and has no greater effect, in so far as this consideration is concerned, than *merely to permit parties to sue the state under the act where the state's consent to be sued otherwise exists* and the facts warrant suit."

In re Bogert's Will, 64 N.M. at 443, 329 P.2d at 1026 (quoting *Taos County Bd. of Educ.,* 44 N.M. at 307, 101 P.2d at 1032) (emphasis added). The Declaratory Judgment Act creates no substantive rights. *Am. Linen Supply v. City of Las Cruces,* 73 N.M. 30, 32, 385 P.2d 359, 360 (1963); *see Sangre de Cristo Dev. Corp. v. City of Santa Fe,* 84 N.M. 343, 346, 503 P.2d 323, 326 (1972) (stating, in a suit for injunctive relief, that "this Court has consistently held [that] the State of New Mexico may not be sued in the courts without its permission or consent").

Furthermore, the legislature has specifically indicated an intent that the New Mexico Declaratory Judgment Act be interpreted uniformly with other similar statutes and, in particular, with federal law on the subject of declaratory judgments. Section 44-6-15. Under federal law, too, the Declaratory Judgment Act is solely a procedural statute that allows enforcement of otherwise established rights; i.e., it does not create either jurisdiction or rights that do not exist by virtue of other law. *B. Braun Med., Inc. v. Abbott Labs., Inc.,* 124 F.3d 1419, 1428 (Fed. Cir. 1997) ("The Declaratory Judgment Act neither expands a court's jurisdiction nor creates new substantive rights.").

Nor do we believe that *New Mexico Right to Choose/NARAL,* 1999-NMSC-005, ¶ 23, helps Plaintiff

here. We do not consider the brief, one-paragraph discussion of sovereign immunity in that sixty-two-paragraph, important opinion to be dispositive of the issue in this case. First, the issue of immunity was raised by two citizens who were not permitted to intervene and whose issues were addressed as if they were presented by an amicus. *Id.* ¶¶ 21-22. It is settled law that amici must take the issues as they find them and may not raise issues not raised by the parties. *Wacondo v. Concha,* 117 N.M. 530, 533, 873 P.2d 276, 279 (Ct. App. 1994). In *New Mexico Right to Choose/NARAL,* the state admitted the jurisdictional allegations and did not assert that it was immune. *Id.* ¶ 23. Second, the Court described a jurisdictional basis other than the Declaratory Judgment Act pursuant to which it ordinarily hears issues such as those raised in the case. *Id.* Thus, the Declaratory Judgment Act was not the only basis for jurisdiction, as it would be in this case. Finally, we do not believe that the Supreme Court intended to overturn decades of established law without so much as a mention of it.

Therefore, we read *New Mexico Right to Choose/NARAL* as consistent with previous law; i.e., the Declaratory Judgment Act waives immunity only to the extent that other statutes allow the claims to be brought in other procedural contexts. For similar reasons, we do not read the discussion in *Ramah Navajo School Board, Inc. v. Bureau of Revenue,* 104 N.M. 302, 309-10, 720 P.2d 1243, 1250-51 (Ct. App. 1986), *abrogated on other grounds by Will v. Mich. Dep't of State Police,* 491 U.S. 58 (1989), without mention of cases such as *In re Bogert's Will, Taos County Board of Education,* or *American Linen Supply,* to be an enforceable holding that the Declaratory Judgment Act contains a general waiver of immunity for any declaratory

judgment action. *See also Ramah Navajo Sch. Bd., Inc. v. Tax. & Rev. Dep't,* 1999-NMCA-050, ¶ 31, 127 N.M. 101, 977 P.2d 1021 (indicating that Court of Appeals is ordinarily bound by Supreme Court precedent).

In addition, in *Cockrell,* the Supreme Court emphasized that any waiver of constitutional immunity must be clear, unambiguous, and not left to inference. *Cockrell,* 2002-NMSC-009, ¶¶ 19-24. It also ruled that it would not find a waiver of immunity under circumstances in which the United States Supreme Court had found that Congress was powerless to act. *Id.* ¶ 23. In *Kimel v. Florida Board of Regents,* 528 U.S. 62, 91 (2000), the Supreme Court held that the ADEA's abrogation of states' sovereign immunity was not a valid exercise of Congressional power under the Fourteenth Amendment. Accordingly, we reject Plaintiff's contention that the Declaratory Judgment Act waives sovereign immunity for his suit alleging a violation of the ADEA.

Ex Parte Young

Plaintiff contends that his suit for declaratory and prospective injunctive relief is permitted by the doctrine set forth in *Ex parte Young* and analyzed pursuant to the four factors used by the federal courts. The doctrine holds that certain suits against state officers for prospective relief are not barred by sovereign immunity. *See Edelman v. Jordan,* 415 U.S. 651, 664 (1974). The four factors are (1) whether the action is against state officials, as opposed to the state itself; (2) whether the alleged conduct violates federal law; (3) whether the relief sought is permissible prospective relief, as opposed to being in actuality a retroactive award of damages; and (4) whether the suit

implicates special sovereignty interests or is the functional equivalent of legal relief that would be otherwise barred. *See Elephant Butte Irrigation Dist. v. Dep't of Interior,* 160 F.3d 602, 609 (10th Cir. 1998). Defendant contends that *Ex parte Young* does not apply in state courts and that Plaintiff has not satisfied the four factors in any event. Defendant also points out that *Kimel* involved suits that included prayers for declaratory and injunctive relief, 528 U.S. at 69, 70, and the United States Supreme Court affirmed the entire dismissal of the suits, stating that, "[b]ecause the ADEA does not validly abrogate the States' sovereign immunity, however, the present suits must be dismissed." *Id.* at 92.

Apart from the difficulties in ascertaining whether Plaintiff's claim for relief is in reality a claim for past and future damages or whether it is merely a declaration of rights with some ancillary effect on the state's treasury, *see Edelman,* 415 U.S. at 667-68, we do not deem it necessary in this case to analyze the four factors. Nor do we trace the history of the *Ex parte Young* doctrine to determine whether it applies in state courts or whether it is an exception to a restriction applicable only to federal courts by virtue of the wording of the Eleventh Amendment. *See Ramah Navajo Sch. Bd., Inc.,* 104 N.M. at 308, 720 P.2d at 1249 ("Because Ramah sued in state court, this particular aspect of Eleventh Amendment immunity is not relevant.").

The Court in *Alden* made clear that an important aspect of the *Ex parte Young* doctrine was that it was necessary to effectuate the supremacy clause.

> In particular, the exception to our sovereign immunity doctrine recognized in *Ex parte Young* . . . is based in part on the premise that sovereign immunity bars relief against States and their

> officers in both state and federal courts, and that certain suits for declaratory or injunctive relief against state officers must therefore be permitted if the Constitution is to remain the supreme law of the land.

Alden, 527 U.S. at 747. If, because of sovereign immunity, there could be no suit against states or state officers in either federal or state court, then "'it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution[.]'" *Id.* (quoting *Gen. Oil Co. v. Crain*, 209 U.S. 211, 226 (1908)). Thus was the doctrine in *Ex parte Young* born.

The dismissal of the declaratory and injunctive aspects of the suits in *Kimel* may therefore be properly understood as emanating from the same doctrine of supremacy. If the purpose of the *Ex parte Young* doctrine is to ensure the Constitution's supremacy, then a congressional act that is constitutionally outside of Congress's power to enact as against the states should not be permitted to be enforced against the states in any way, either in state or federal court. That the ADEA's abrogation of sovereign immunity is constitutionally outside of Congress's power to enact is clear according to *Kimel*, 528 U.S. at 91. For these reasons, the doctrine of *Ex parte Young* does not help Plaintiff.

Other Issues

In light of our affirmance of the dismissal of Plaintiff's complaint on grounds of sovereign immunity, we need not consider the merits of Plaintiff's ADEA claim. In affirming the dismissal of Plaintiff's ADEA claim, we express no opinion on whether Plaintiff has or does not

have other remedies to enforce any retirement rights that he claims to have. Plaintiff's complaint relied exclusively on the ADEA, as did Plaintiff's briefs, both below and on appeal.

We have considered Defendant's request for sanctions, contained in its motion to dismiss Plaintiff's appeal, which Defendant filed six days after Plaintiff's brief in chief was filed and which was predicated on Plaintiff's brief being eight days late. Plaintiff's attorney explained that he calendared the due date for his brief only a few days after his son was born and when he was not thinking very clearly. Defendant's allegation of prejudice was that it did not know when its brief was due, but the applicable rule states that the answer brief is due forty-five days after service of the brief in chief. Rule 12-210(B)(2) NMRA 2002. Defendant's motion to dismiss was denied, but the request for fees and costs was taken under advisement. Under these circumstances, which involve only a matter of days, which involve an understandable excuse, and which involve a brief that had already been filed, we do not believe the motion to dismiss or the request for the fees and costs incurred in filing the motion were warranted. Nonetheless, we agree with Defendant that it would have been better form for Plaintiff's counsel to have moved at the time the brief was filed for permission to file the brief late.

Conclusion

The order dismissing the complaint is affirmed.

IT IS SO ORDERED.

/s/ Lynn Pickard
LYNN PICKARD, Judge

WE CONCUR:

/s/ Michael D. Bustamante
MICHAEL D. BUSTAMANTE, Judge

/s/ Jonathan B. Sutin
JONATHAN B. SUTIN, Judge

APPENDIX D

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

February 4, 2003

NO. 27,823

JAMES GILL,

Plaintiff-Petitioner,

vs.

PUBLIC EMPLOYEES
RETIREMENT BOARD of the
PUBLIC EMPLOYEES
RETIREMENT ASSOCIATION
OF NEW MEXICO,

Defendant-Respondent.

WRIT OF CERTIORARI

TO: New Mexico Court of Appeals

GREETINGS:

WHEREAS, petitioner did apply to this Court on December 9, 2002, for review of an opinion handed down by the New Mexico Court of Appeals on November 21, 2002, in cause numbered 21,818 captioned *Gill v. Public Employees Retirement Board*;

WHEREAS, The Supreme Court gave notice to the Court of Appeals on December 9, 2002, in compliance with Rule 12-502 NMRA of the Rules of Appellate Procedure, that a petition for writ of certiorari had been filed in the above entitled cause; and

WHEREAS, a copy of the petition for writ of certiorari has been served on respondent in the above entitled cause.

NOW, THEREFORE, the writ of certiorari hereby is issued and the New Mexico Court of Appeals hereby is ordered to proceed no further in cause numbered 21,818 pending further order of this Court.

IT IS SO ORDERED.

WITNESS, Honorable Petra Jimenez Maes, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 4th day of February, 2003.

(SEAL)

/s/ Kathleen Jo Gibson
Kathleen Jo Gibson,
Chief Clerk of the
Supreme Court of the
State of New Mexico

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: _____

Filing Date: _____

NO. 27,823

JAMES GILL,

Plaintiff-Petitioner,

vs.

PUBLIC EMPLOYEES RETIREMENT BOARD of the PUBLIC EMPLOYEES RETIREMENT ASSOCIATION OF NEW MEXICO,

Defendant-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Carol Vigil, District Judge

Rhodes & Salmon, P.C.
Hazen H. Hammel
Albuquerque, NM

for Petitioner

Hinkle, Hensley, Shanor & Martin, L.L.P.
Ellen Casey
Dana Simmons Hardy
Santa Fe, NM

for Respondent

OPINION

(Filed Mar. 30, 2004)

BOSSON, Justice.

In *Cockrell v. Board of Regents of New Mexico State University,* 2002-NMSC-009, 132 N.M. 156, 45 P.3d 876, we acknowledged New Mexico's constitutional sovereign immunity, derived from both the federal Constitution and recent U.S. Supreme Court precedent. We continue to clarify the contours of that immunity by defining the limited circumstances under which a state official may be sued for prospective, injunctive relief. Consistent with federal law and our obligations as a state under the federalist compact, we apply the doctrine of *Ex parte Young* to such actions as a limited exception to constitutional sovereign immunity. *See Ex parte Young,* 209 U.S. 123 (1908).

BACKGROUND

In 1974, at the age of 49, James Gill joined the Hondo Volunteer Fire Department as a charter member. During his tenure, Gill served as an engineer, fireman, and Chief of the Department, and enjoyed all the benefits received by active members of the Department. After his retirement in February 1997, Gill applied for retirement benefits of $100 a month, based on his 22 years of service. *See* NMSA 1978, § 10-11A-5(B) (1983) (describing eligibility for retirement annuity). Shortly thereafter, the Public Employees Retirement Board (PERB), a state agency acting as the trustee for the various retirement funds handled by the Public Employees Retirement Association of New Mexico (PERA), denied Gill's claim for benefits, stating:

> Because you were over the age of 45 in 1979, the year in which you first could have acquired a service credit, YOU DO NOT QUALIFY to be a member and therefore, do not qualify for the benefits under the Volunteer Firefighters Retirement Act.

The Volunteer Firefighters Retirement Act (VFRA) straightforwardly defines an eligible "member" as a volunteer firefighter whose first year of service credit was accumulated "no later than the year which he attained the age of forty-five." NMSA 1978, § 10-11A-2(E) (1983, amended 2003). Although the New Mexico legislature has amended Section 10-11A-2(E) (2003) to apply to volunteer firefighters whose first year of service credit was accumulated during or after the year the firefighter attained the age of 16, Gill's claim is not moot because the amended statute refers to "an active member on the rolls of a fire department" and makes no mention of retroactive effect. "[T]he general rule is that statutes apply prospectively unless the [l]egislature manifests clear intent to the contrary." *Gallegos v. Pueblo of Tesuque,* 2002-NMSC-012, ¶ 33, 132 N.M. 207, 46 P.3d 668. As a result, the amended statute does not apply to current retirees, such as Gill.

Gill filed charges with the Equal Employment Opportunity Commission (EEOC) and New Mexico Human Rights Division, and received a "Right to Sue" notice from the EEOC on February 28, 2000. Gill filed this lawsuit *pro se* and later retained counsel. Gill claims that Section 10-11A-2(E) of the VFRA violates the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (2000), which prohibits arbitrary discrimination against employees who are at least 40 years old, based solely on age. *See* §§ 623(a), 631(a). Gill sued PERB for declaratory

relief, and an injunction that would require PERB to discontinue enforcement of Section 10-11A-2(E), the statutory provision declaring him ineligible for retirement benefits based upon his age. In response to Gill's complaint, PERB filed a motion to dismiss asserting sovereign immunity, and Gill filed a cross motion for summary judgment. The district court agreed with PERB and granted its motion to dismiss. The Court of Appeals affirmed, holding that the state had not waived its constitutional sovereign immunity, and PERB, as a state agency, was immune from suit. *Gill v. Pub. Employees Ret. Bd.*, 2003-NMCA-038, ¶ 8, 133 N.M. 345, 62 P.3d 1227. The Court of Appeals rejected Gill's two principal theories: (1) that New Mexico's Declaratory Judgment Act, NMSA 1978, §§ 44-6-1 to -15 (1975, as amended through 2003), constituted a waiver of state sovereign immunity, and (2) that state courts can apply the *Ex parte Young* doctrine as a limited exception to state constitutional sovereign immunity so as to afford aggrieved citizens prospective equitable relief against state officials and curtail the violation of federal law. We agree with the Court of Appeals on the first point. However, for the reasons discussed below, we disagree with the Court of Appeals on its rejection of the *Ex parte Young* doctrine, which we regard as an important constitutional component to New Mexico's relationship with the United States Congress.

DISCUSSION

Federalism and State Constitutional Sovereign Immunity

The subject of federalism, and specifically the balance between the powers of our national government and the powers of the several states, has been a source of debate

throughout our nation's history. Recently, the United States Supreme Court has charted a new course, altering the federalist balance to extend the doctrine of state constitutional sovereign immunity and limit the power of Congress to abrogate, or override, that immunity. *See* Erwin Chemerinsky, *The Federalism Revolution,* 31 N.M. L. Rev. 7 (2001); Daan Braveman, *Enforcement of Federal Rights Against States: Alden and Federalism Non-Sense,* 49 Am. U. L. Rev. 611 (2000); *see also* U.S. Const. amend. XI.

In its seminal opinion, *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996), the Supreme Court held that Congress can only authorize suits against non-consenting states when acting within its power under Section 5 of the Fourteenth Amendment, not under another source of constitutional authority such as the Commerce Clause. Section 5 of the Fourteenth Amendment contains an express grant of power authorizing Congress to enforce the Constitution "by appropriate legislation."

Since that time, the Court has determined that a number of valid federal statutes could not be enforced against states, absent their consent, because Congress exceeded its power under Section 5 of the Fourteenth Amendment. For example, the Supreme Court determined that the ADEA, the statute at issue in this case, did not validly abrogate the states' constitutional sovereign immunity from suit so as to permit an aggrieved individual to enforce that statute against a state agency. *See Kimel v. Fla. Bd. of Regents,* 528 U.S. 62 (2000) (holding that Congress exceeded its Fourteenth Amendment, § 5 authority, in enacting the enforcement provisions of the ADEA). Accordingly, we start from the undeniable premise that, absent their consent, states may not be sued by private individuals in federal court to enforce rights granted them

under the ADEA. *See also, e.g., Bd. of Trustees of the Univ. of Ala. v. Garrett,* 531 U.S. 356 (2001) (holding that Congress exceeded its Fourteenth Amendment, § 5 authority, by enacting the enforcement provisions of the Americans with Disabilities Act (ADA) to be applicable against the states).

The Supreme Court has expanded the scope of state constitutional sovereign immunity to include such claims filed in state, as well as federal court. In *Alden v. Maine,* 527 U.S. 706, 711 (1999), probation officers filed a claim for overtime wages and damages against their state employer, pursuant to the federal Fair Labor Standards Act (FLSA). *See also* 29 U.S.C. §§ 201-219 (2000). The action against the state, initially brought in federal court, was dismissed after a determination that the FLSA did not abrogate the state's constitutional sovereign immunity. *Alden,* 527 U.S. at 712. The probation officers then filed the same action in state court. *Id.* For the first time, the Supreme Court held that Congress also lacked the authority to subject a non-consenting state to an FLSA claim brought in state court. *Id.*

Limitations on the State Constitutional Sovereign Immunity Recognized in *Alden*

Although *Alden* expanded the doctrine of constitutional state sovereign immunity to actions in state courts, the United States Supreme Court limited the scope of that immunity and its exceptions. For example, a state may be sued when it consents to suit. Additionally, citizens may sue an entity that is not considered an "arm of the state." *Alden,* 527 U.S. at 756. Thirdly, aggrieved citizens may sue state officers for prospective, injunctive relief through the *Ex parte Young* doctrine. *Id.* at 747.

These three exceptions to state constitutional sovereign immunity describe limited circumstances under which, in the opinion of the United States Supreme Court, a federal statutory claim does not unduly encroach upon a state's autonomy or core sovereign interests. Thus, when the facts no longer support the very reason for constitutional sovereign immunity, then the doctrine must give way and state courts must allow claims to proceed in deference to federal law and the Supremacy Clause of the United States Constitution. "The principle of sovereign immunity as reflected in our jurisprudence strikes the proper balance between the supremacy of federal law and the separate sovereignty of the states." *Alden,* 527 U.S. at 757; *see also* U.S. Const. art. VI, § 2 (Supremacy Clause). Although entitled to the immunity necessary to preserve their autonomy as separate sovereigns, states are bound to recognize the supremacy of the United States Constitution. "The good faith of the States thus provides an important assurance that '[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.'" *Alden,* 527 U.S. at 755 (*quoting* U.S. Const. art. VI). Thus, under the federalist compact, the obligation of states to respect federal law and rights created thereunder is an essential corollary of state sovereignty. *See Cockrell,* 2002-NMSC-009, ¶ 27 (acknowledging the state's duty to comply with federal law). "Even the most ardent advocate of federalism rejects the idea that states should be free to ignore or undercut constitutionally guaranteed individual liberties." Calvin Massey, *Federalism and the Rehnquist Court,* 53 Hastings L. J. 431, 440 (2002); *see also* Laura S. Fitzgerald, *Suspecting the States: Supreme Court Review of State-court State-law Judgments,* 101 Mich. L. Rev. 80, 81 (2002) (asserting that federal courts must now presume that

state courts can be trusted to respect and apply federal law).

As noted above, one important limitation on sovereign immunity is a state's clear and unambiguous consent to suit. *See Cockrell,* 2002-NMSC-009, ¶ 24; *see also Alden,* 527 U.S. at 755-56 (discussing how states have consented, through the ratification of the Constitution, to suits brought by the federal government or by other states). In this case, Gill contends that New Mexico waived its sovereign immunity by enacting the Declaratory Judgment Act, which states that "the state of New Mexico, or any official thereof, may be sued and declaratory judgment entered when the rights, status or other legal relations of the parties call for a construction of the constitution of the state of New Mexico, the constitution of the United States or any of the laws of the state of New Mexico or the United States, or any statute thereof." Section 44-6-13. Gill's argument does not persuade us just as it did not persuade the Court of Appeals. The Declaratory Judgment Act does not have the effect of general consent to be sued; it merely permits parties to sue the state when the state's consent to be sued otherwise exists. *See In re Bogert's Will,* 64 N.M. 438, 443, 329 P.2d 1023, 1026 (1958). We see no reason to revisit that well-established New Mexico law regarding the Declaratory Judgment Act.

The Significance of the *Ex parte Young* Doctrine

The *Alden* exception most important to our analysis of Gill's claim is *Ex parte Young,* which permits certain suits against state officers, but only for prospective injunctive or declaratory relief, or for monetary relief that is not sought from the state treasury. *See Alden,* 527 U.S. at 756-57

(citing *Ex parte Young,* 209 U.S. at 159-60). Our Court of Appeals rejected Gill's *Ex parte Young* claim based on its understanding of the Supreme Court holding in *Kimel,* that Congress lacked the authority to abrogate state constitutional sovereign immunity through the ADEA. *Kimel,* 528 U.S. at 91; *see Gill,* 2003-NMCA-038, ¶ 12.

According to the Court of Appeals, "[i]f the purpose of the *Ex parte Young* doctrine is to ensure the Constitution's supremacy, then a congressional act that is constitutionally outside of Congress's power to enact as against the states should not be permitted to be enforced against the states in any way, either in state or federal court." *Gill,* 2003-NMCA-038, ¶ 12. We respectfully disagree. The Court of Appeals' analysis of the *Ex parte Young* doctrine directly conflicts with *Alden* and *Cockrell.* If left intact, that analysis would inappropriately extend our state constitutional sovereign immunity beyond what is necessary to protect New Mexico's core sovereign interests, and beyond the bounds of "good faith" and the federalist compact, as described by the United States Supreme Court in *Alden* and by this Court in *Cockrell,* 2002-NMSC-009, ¶ 28 ("[C]onstitutional sovereign immunity 'does not bar certain actions against state officers for injunctive or declaratory relief.'") (quoting *Alden,* 527 U.S. at 757).

Although a state's constitutional sovereign immunity prevents individual enforcement of certain federal statutes against a state, such as the FLSA claims at issue in *Alden* and *Cockrell,* that immunity does not undermine the basic *validity* of the legislation. Federal statutes enacted by Congress under its constitutional authority remain valid and in effect, even if they may not be enforced in all instances and against all defendants. *See Cockrell,* 2002-NMSC-009, ¶¶ 27-28 (noting that the application of

constitutional sovereign immunity may sometimes result in federal rights without remedies); *Seminole Tribe,* 517 U.S. at 72. Although the Supreme Court held in *Kimel,* 528 U.S. at 78, that individuals may not bring ADEA suits against states, the Court did not invalidate the ADEA or declare it unconstitutional.

The ADEA was duly enacted under Congress' Commerce Clause authority. *See id.* States are subject to suit by the federal government for noncompliance. *Garrett,* 531 U.S. at 374. Individuals are subject to suit for damages under the ADEA. It remains valid legislation. *Kimel* did not overrule this authority, as we discussed in *Cockrell,* 2002-NMSC-009, ¶ 27 ("[T]he state is bound by the substantive provisions of the FLSA and is not free to disregard its obligations under federal law."). The only remaining question is what remedy is available when state officials violate federal law. We find nothing in *Alden, Kimel,* or *Cockrell* to support the Court of Appeals' conclusion that all ADEA claims are barred by state constitutional sovereign immunity, especially when they may fall into one of the limitations or exceptions recognized in *Alden.* This is particularly true of the *Ex parte Young* doctrine.

Ex parte Young's Origins

In 1908, the United States Supreme Court held in *Ex parte Young,* 209 U.S. at 159-60 that the Eleventh Amendment generally does not preclude a suit brought against a state official in federal court for prospective equitable relief, even when the state is otherwise immune from suit. This doctrine, which the federal courts have applied for nearly a century, provides "a powerful tool for

ensuring state compliance with federal law," without undue encroachment on state sovereignty. *Elephant Butte Irrigation Dist. v. Dep't of Interior,* 160 F.3d 602, 608 (10th Cir. 1998).

Ex parte Young claims were originally conceived as an essential tool for ensuring that constitutional guarantees would be enforced. *Alden* emphasized the importance of this exception to preserving the balance between state autonomy and the enforcement of constitutional rights:

> In particular, the exception to our sovereign immunity doctrine recognized in *Ex parte Young* is based in part on the premise that sovereign immunity bars relief against States and their officers in both state and federal courts, and that certain suits for declaratory or injunctive relief against state officers must therefore be permitted if the Constitution is to remain the supreme law of the land.

Alden, 527 U.S. at 747 (citation omitted).

In 1997, the Supreme Court narrowed the *Ex parte Young* doctrine to exclude certain actions for prospective equitable relief against state officials that would impinge upon special sovereign interests. *Idaho v. Coeur d'Alene Tribe,* 521 U.S. 261, 283 (1997) (holding that the state had a unique sovereign interest in submerged land within its borders, and therefore state officials could not be sued even under *Ex parte Young*). The previous year, in *Seminole Tribe,* 517 U.S. at 74, the Supreme Court also held that an *Ex parte Young* suit against state officers was impermissible because the federal Indian Gaming Regulatory Act contained its own comprehensive, and exclusive, enforcement mechanisms.

With these limited exceptions in mind, *Ex parte Young* retains its full vitality. Just last year, in *Verizon Maryland, Inc. v. Public Service Commission,* 535 U.S. 635 (2002), the Supreme Court allowed an *Ex parte Young* action under the federal Telecommunications Act. Distinguishing the Indian Gaming Regulatory Act, the Court noted that the Telecommunications Act does not contain a "detailed and exclusive remedial scheme like the one in *Seminole Tribe.*" *Verizon,* 535 U.S. at 647. Similarly, the ADEA at issue in this appeal has no "detailed and exclusive remedial scheme." *Id.* And, as we shall discuss shortly, prospective relief in the case at bar would not impinge upon core sovereign interests, of the kind discussed in *Coeur d'Alene Tribe*, 521 U.S. at 283.

The *Ex parte Young* Doctrine Endures as an Exception to State Sovereign Immunity

In *Kimel,* the Supreme Court did not expressly address the viability of injunctive relief to enforce the ADEA. But the Court subsequently spoke on the same subject, and clarified that the lack of a remedy for damages due to sovereign immunity and the Eleventh Amendment did not invalidate the ADEA as applied to the states. In *Garrett,* 531 U.S. at 356, state employees sued the university board of trustees under the ADA for failure to accommodate the disabled. Just as with the ADEA in *Kimel,* the Court found that the abrogation of sovereign immunity from suit under the ADA was not enacted pursuant to a valid exercise of the congressional power afforded in Section 5 of the Fourteenth Amendment. However, the Court explicitly stated that despite the failure of the law to abrogate constitutional sovereign immunity, *Ex parte Young* still

offers a viable route for relief against the state for injunctive relief to enforce the law.

> Congress is the final authority as to desirable public policy, but in order to authorize private individuals to recover *money damages* against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation. Those requirements are not met here, and to uphold the Act's application to the States would allow Congress to rewrite the Fourteenth Amendment law laid down by this Court in *Cleburne*.

Garrett, 531 U.S. at 374. In a footnote, the court then stated:

> Our holding here that Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no federal recourse against discrimination. *Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under Ex parte Young* . . . In addition, state laws protecting the rights of persons with disabilities in employment and other aspects of life provide independent avenues of redress.

Id. at 374 n.9 (emphasis added).

This passage clarifies what had been left open in *Kimel*: that *Ex parte Young* remains a viable action for injunctive relief when damages are not available because

Congress has failed to abrogate States' immunity under Section 5 of the Fourteenth Amendment. It also emphasizes that federal laws like the ADEA and ADA remain applicable to the states, even though states are not subject to suit for money damages under these laws. Thus, as we have previously stated, the Court of Appeals' conclusion in Gill's case that Congress lacked the power to make the ADEA applicable to the states is incorrect as a matter of constitutional law. *See Frew ex rel. Frew v. Hawkins,* 124 S.Ct. 899 (2004) (upholding *Ex parte Young* prospective relief against state officers to vindicate federal law even though state sovereign immunity would preclude retrospective relief for money damages).

The effect of Congress' failure to abrogate state sovereign immunity in the context of the ADEA was recently discussed in *State Police for Automatic Retirement Association v. DiFava,* 317 F.3d 6 (1st Cir. 2003). In *DiFava,* a Massachusetts law substantially lowered the mandatory retirement age for certain police officers. *Id.* at 8. In an appeal from a preliminary injunction preventing the state from forcing police officers to retire, the court addressed whether the ADEA remains applicable to the states after *Kimel,* the very question our Court of Appeals answered in the negative in regard to Gill. *DiFava,* 317 F.3d at 8. The *DiFava* court expressly rejected the contention that *Kimel* rendered the ADEA inapplicable to states, and upheld an injunction under *Ex parte Young* for prospective relief under the ADEA. *DiFava,* 317 F.3d at 11-12.

DiFava also reinforced the understanding that the traditional exceptions to sovereign immunity continue in effect, even under federal legislation that fails to satisfy Section 5 of the Fourteenth Amendment. 317 F.3d at 12. "The Eleventh Amendment . . . does not confer upon the

states a total immunity against suit." *Id.*; *Alden*, 527 U.S. at 755. Therefore, legislation that does not satisfy Section 5 may nevertheless be enforceable against the states in other ways. In *Cockrell* this Court described several alternative forms of recourse available to plaintiffs despite the existence of constitutional sovereign immunity, including "certain actions against state officers for injunctive or declaratory relief." 2002-NMSC-009, ¶ 28 (quoting *Alden*, 527 U.S. at 757). No heightened immunity is bestowed upon states by virtue of a finding that Congress cannot abrogate state immunity in a given statute. Instead, states maintain the same degree of immunity from suit by private individuals seeking money damages. This immunity is subject to certain exceptions and limitations, such as state consent to suit, or enforcement of the act through an action initiated by the United States, or an equitable action under *Ex parte Young*.

Ex parte Young Applies in State Court

DiFava and *Garrett* applied *Ex parte Young* in federal court, not state court. *Alden* confirms that *Ex parte Young* also applies in state courts. In restating that *Ex parte Young* applies in state courts, an idea first articulated nearly 100 years ago in *General Oil Co. v. Crain*, 209 U.S. 211 (1908), the *Alden* Court described the importance of maintaining the *Ex parte Young* doctrine:

> In particular, the exception to our sovereign immunity doctrine recognized in *Ex parte Young* is based in part on the premise that sovereign immunity bars relief against States and their officers *in both state and federal courts*, and that certain suits for declaratory or injunctive relief

> against state officers must therefore be permitted if the Constitution is to remain the supreme law of the land.

Alden, 527 U.S. at 747 (emphasis added). *Alden* goes on to state, "[h]ad we not understood the States to retain a constitutional immunity from suit in their own courts, the need for the *Ex parte Young* rule would have been less pressing, and the rule would not have formed so essential a part of our sovereign immunity doctrine." *Id.* at 748 (citing *Coeur d'Alene*, 521 U.S. at 270-71).

Limited exceptions to sovereign immunity are needed to maintain pathways for individuals who have suffered damages due to violations of federal law by state officials. The use of the *Ex parte Young* fiction is an attempt to strike a balance between respect for the dignity and autonomy of the state, and the need to maintain the supremacy of federal law. Encroachment into state autonomy is minimized, while valid federal law maintains a meaningful presence within state government. Several post-*Alden* state cases confirm that *Ex parte Young* is available in state court as an exception to sovereign immunity. *See Middleton v. Hartman*, 45 P.3d 721, 727 (Colo. 2002) (citing *Ex parte Young* as one of six exceptions to the doctrine of sovereign immunity, the court held that because the state would not be liable for damages, except for those damages it had voluntarily assumed, a suit for prospective injunctive relief was not barred by constitutional sovereign immunity); *Purvis v. Williams*, 73 P.3d 740, 749 (Kan. 2003) (stating that an *Ex parte Young* suit for prospective injunctive relief is one of "three ways state immunity may be relinquished" in Kansas); *see also Connelly v. State Highway Patrol*, 26 P.3d 1246, 1259 (Kan. 2001); *Prager v. State Dep't of Revenue*, 20 P.3d 39,

55 (Kan. 2001); *Brown v. Div. of Motor Vehicles,* 573 S.E.2d 246 (N.C. Ct. App. 2002) (acknowledging the availability of an *Ex parte Young* action brought under the ADA in state court).

We hold that the *Ex parte Young* doctrine does apply to suits brought in New Mexico state courts to enforce rights validly created under federal law. We now turn to the procedural requirements of this doctrine: (1) the plaintiff must allege an ongoing violation of federal law; (2) the suit must not implicate special state sovereignty interests; (3) the relief sought must be prospective and injunctive; (4) the suit must be directed at officers of the state, and not the state itself.

The Alleged Conduct Violated Federal Law

According to a recent U.S. Supreme Court opinion, "[i]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry' into whether [the] complaint alleges an ongoing violation of federal law . . . " *Verizon,* 535 U.S. at 645 (explaining that the inquiry into whether suit lies under *Ex parte Young* does not include analyzing the merits of the claim) (internal quotation marks and citation omitted). Because the ADEA remains applicable to the states, the straightforward inquiry described in *Verizon* applies in this case. To make a prima facie showing of an ADEA violation, Gill must establish that he was treated adversely in his employment because of his age, and that he was at least 40 years of age at the time of the alleged discrimination. *See* 29 U.S.C. §§ 623, 631(a). Pursuant to Section 10-11A-2(E) (prior to 2003 amendment), Gill was denied retirement benefits based

solely on his age. The district court granted PERB's motion for summary judgment based on constitutional sovereign immunity, without reaching the merits of the complaint. We are satisfied that Gill's complaint, sufficiently alleges an ongoing violation of the ADEA.

The Suit Must Not Implicate Special State Sovereignty Interests

Even if a party brings an otherwise appropriate *Ex parte Young* action, constitutional state sovereign immunity can still bar suit if the requested relief is "far reaching and intrusive" on core state functions or "an impermissible affront" to the state's political authority. *Elephant Butte,* 160 F.3d at 612-13; *Coeur d'Alene Tribe,* 521 U.S. at 281-83. Two federal cases have used the special sovereign interests criteria to carve out specific exceptions to the *Ex parte Young* doctrine. In *Coeur d'Alene Tribe,* 521 U.S. at 281-83, 87, the Supreme Court ruled that a state's interest in its submerged lands was a sufficiently special state sovereign interest to bar an *Ex parte Young* action. In *ANR Pipeline Co. v. LaFaver,* 150 F.3d 1178, 1194 (10th Cir. 1998), the Tenth Circuit found a state's property tax scheme to be a sufficiently special state sovereign interest to bar relief. More recently, the Tenth Circuit has explained that the *Coeur d'Alene Tribe* and *ANR Pipeline* reflect extreme and unusual cases in which relief may be denied because of "particular and special circumstances" that affect "special sovereignty interests" and cause "offense to [the state's] sovereign immunity." *J.B. ex rel. Hart v. Valdez,* 186 F.3d 1280, 1286-87 (10th Cir. 1999).

Most *Ex parte Young* cases do not implicate core state functions, and therefore "[t]he interest of vindicating the

federal rights and answering the federal questions involved substantially outweigh the state's sovereign interests." *Elephant Butte,* 160 F.3d at 613. Outside of land use and taxation, numerous cases have employed the *Ex parte Young* remedy in a variety of contexts, including management of social and educational programs, welfare distribution, management of trust lands, and the re-appropriation of surplus funds. *See, e.g., Joseph A. ex rel. Corrine Wolfe v. Ingram,* 275 F.3d 1253, 1260-61 (10th Cir. 2002) (holding that welfare distribution is not a core sovereign interest comparable to power to tax); *Harris v. Owens,* 264 F.3d 1282, 1293-94 (10th Cir. 2001) (holding that funds requested by plaintiff prior to their entry into the treasury was not the equivalent of an appropriations bill, and "[t]he state's interest with respect to these future funds is not related to appropriations but to revenue sources, an interest we have rejected as sufficiently special to serve as an exception to *Ex parte Young*"); *Lewis v. N.M. Dep't of Health,* 261 F.3d 970, 978 (10th Cir. 2001) (administration of Medicaid program is not core sovereign interest); *Ellis v. Univ. of Kan. Med. Ctr.,* 163 F.3d 1186 (10th Cir. 1998) (concluding that a limitation on state medical residency criteria for school admission is not a special sovereignty interest and does not threaten existence of state government); *Branson Sch. Dist. RE-82 v. Romer,* 161 F.3d 619, 632 (10th Cir. 1998) (holding that the state has no special sovereign interests in managing lands held in trust).

We are not persuaded that Gill's ADEA claim presents an impermissible affront to New Mexico's special sovereign interests or its political autonomy. We observe that New Mexico created a state remedy for age discrimination through the New Mexico Human Rights Act that affords victims back wages and other monetary relief. *See* NMSA

1978, §§ 28-1-7(A), -2(A) (1993); *Elephant Butte,* 160 F.3d at 613. Gill's claim under *Ex parte Young,* being only for prospective, injunctive relief, may well have a lesser impact upon the state treasury than what the state has already authorized under state law.

The Relief Sought is Prospective and Injunctive

In oral argument before this Court, Gill conceded that under an *Ex parte Young* theory of relief, he could only seek an injunction to require payment of future retirement benefits, not retroactive damages for past benefits. This is an important distinction, both to the law and to the viability of Gill's claim. Nonetheless, PERB characterizes Gill's claim as "a direct raid on the state's treasury," and argues that monetary relief of any kind is not available under the *Ex parte Young* doctrine. We acknowledge that even injunctive relief may have some impact upon the state treasury. Under the leading precedent, however, the pertinent inquiry is not whether the relief will require the incidental payment of state funds, but whether the relief will remedy future rather than past wrongs. *See Elephant Butte,* 160 F.3d at 611.

Ex parte Young actions for prospective relief have been allowed, even when such an award would have a "substantial ancillary effect on the state treasury." *ANR Pipeline,* 150 F.3d at 1189; *see Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 96 (1984) (citing *Ex parte Young*). For example, in a case involving the denial of supplemental social security income benefits, the Tenth Circuit disallowed retroactive monetary reimbursement for federal benefits withheld by the state, but held that recipients could seek prospective injunctive relief against *future* withholdings.

Johns v. Stewart, 57 F.3d 1544, 1553-55 (10th Cir. 1995). Although courts should be circumspect regarding requests for monetary relief in an *Ex parte Young* action, "relief that serves to directly bring about an end to a present violation of federal law is not barred by the Eleventh Amendment even though accompanied by a substantial ancillary effect on the state treasury." *Harris,* 264 F.3d at 1291 (quoting *Papasan v. Allain,* 478 U.S. 265, 278 (1986)).

We also disagree that Gill's claim is a "raid on the state treasury." The Volunteer Firefighter's Retirement Fund (VFRF), which PERB oversees, and from which it would pay Gill's claim, is segregated from the state general fund and from all other state retirement funds. *See* NMSA 1978, § 10-11A-3 (1997) (forming a separate retirement fund allocated on a static basis). Furthermore, unlike other PERA funds, the VFRF is not appropriated on an actuarial basis. VFRF's appropriation in any subsequent year will remain unchanged, regardless of whether PERB is forced to provide Gill with benefits. In fact, the state is prohibited from reclaiming any surplus funds in the VFRF at the end of the fiscal year. *See* Section 10-11A-3(B) (1983), and 2002 supp. comment on "Appropriations"; *cf.* NMSA 1978, § 21-8-5 (1953), and 2000 supp. comment on "Appropriations" (providing that unexpended university funds shall revert to the general fund).

We conclude, therefore, that Gill is seeking permissible prospective, injunctive relief that would only have an ancillary effect on the state treasury. He is asking the court to enjoin future violations of the ADEA. If compliance with federal law also brings some financial benefit to Gill, that hardly constitutes an impermissible raid on the state treasury, such that we would turn a blind eye to Gill's predicament and New Mexico's constitutional obligation to

comply with federal law. Speaking very recently, the United States Supreme Court reinforced the prospective versus retrospective relief distinction,

> The Eleventh Amendment confirms the sovereign status of the States by shielding them from suits by individuals absent their consent. To ensure the enforcement of federal law, however, the Eleventh Amendment permits suits for prospective injunctive relief against state officials acting in violation of federal law. This standard allows courts to order prospective relief, as well as measures ancillary to appropriate prospective relief. Federal courts may not award retrospective relief, for instance money damages or its equivalent, if the State invokes its immunity.

Frew, 124 S.Ct. at 903 (citations omitted).

The Proper Party Defendants

Traditionally, *Ex parte Young* suits name one or more individual state officers to be sued in their official capacities. *Verizon,* 535 U.S. at 645. The purpose of naming an individual officer in an *Ex parte Young* claim is to identify the party whose conduct violated federal law, and more importantly to ensure that future conduct conforms to federal law. The focus of determining if an action fits into the *Ex parte Young* rubric is not simply the identity of the named party, but whether the State is the real party in interest and thus, whether a suit might intrude upon the sovereignty and autonomy of the State. It has been consistently noted that, "*Young*'s applicability 'is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record.'" *Coeur d'Alene,* 521 U.S.

at 278 (Kennedy, J.) (quoting *In re State of New York,* 256 U.S. 490, 500 (1921)).

Mr. Gill's *Ex parte Young* action is directed towards PERB, not toward a state official or officials. *Elephant Butte,* 160 F.3d at 609. Instead, Mr. Gill appears to argue that, because PERB is made up of individuals, he need not name them as such, emphasizing that a majority of a quorum is necessary for a PERB decision. We disagree. The requirement that a plaintiff must sue a state official in an *Ex parte Young* claim remains an integral component of the *Ex parte Young* construct.

However, Gill may still amend his complaint pursuant to Rule 1-015(C) NMRA 2004. This rule permits an amendment to a party named in a suit to relate back to the date of the original pleading if the parties named in the amended pleading received notice of the action, and knew or should have known that, but for a mistake concerning the identities of the proper parties, the actions would have been brought against them originally. Rule 1-015(C). Because the individual members of the PERB were on notice of this proceeding, and because the claim asserted in the amended pleading arises "out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading," Gill may amend his claim to add the individual members of the PERB. We therefore remand to the district court to allow Gill to amend his complaint pursuant to Rule 1-015 NMRA 2004.

CONCLUSION

For the reasons stated, we reverse the Court of Appeals and remand this case to the district court for further proceedings consistent with this opinion.

IT IS SO ORDERED.

/s/ Richard C. Bosson
RICHARD C. BOSSON,
Justice

WE CONCUR:

/s/ Petra J. Maes
PETRA JIMENEZ MAES, Chief Justice

/s/ Patricio M. Serna
PATRICIO M. SERNA, Justice

/s/ Edward L. Chavez
EDWARD L. CHAVEZ, Justice

PAMELA B. MINZNER, Justice (specially concurring)

MINZNER, Justice (specially concurring).

I concur in the majority opinion but write separately in order to emphasize the importance I place on the analysis in *Cockrell v. Board of Regents of New Mexico State University,* 2002-NMSC-009, 132 N.M. 156, 45 P.3d 876, in reversing the Court of Appeals. Further, I believe the opinion of the Court of Appeals, as did the opinion in *Cockrell,* recognized an important anomaly within the body of case law we apply. I am persuaded that we adopted an approach in *Cockrell* we should continue to pursue.

In *Cockrell,* we discussed the effect of several opinions by the United States Supreme Court on issues of federalism. We concluded that these opinions have determined that each State enjoys a form of constitutional sovereign immunity, and this unique constitutional immunity precludes Congress from providing for enforcement against a state absent its consent. *Id.* ¶ 8. As we noted in *Cockrell,* however, the United States Supreme Court also

indicated that a statute Congress may not make enforceable against a State, absent its consent, nevertheless can continue to be "binding on the States pursuant to the Supremacy Clause of Article VI of the Constitution." *Id.* ¶¶ 5, 27.

We specifically said in *Cockrell,*

> [W]e do not believe that it is within this Court's province to decide whether the State should subject itself to liability for a federal claim filed in state court. Under the principle of separation of powers embodied in Article III, Section 1 of the New Mexico Constitution, we believe this is a matter for the Legislature. Unlike the decision "to do away with common law principles," [*Hicks v. State,* 88 N.M. 588, 590, 544 P.2d 1153, 1155 (1975)], which is within this Court's power, the decision to waive this State's constitutional sovereign immunity would represent an alteration of the constitutional balance of power between the Federal Government and the State of New Mexico that was struck by the Supreme Court in *Alden [v. Maine,* 527 U.S. 706 (1999)].

Id. ¶ 13.

Our opinion in this case might appear inconsistent with this portion of *Cockrell.* In applying *Ex parte Young,* 209 U.S. 123 (1908) to the facts of this case, reversing both the trial court and the Court of Appeals, and recognizing a private enforcement claim, we may appear to be in effect exercising the Legislature's prerogative to determine when or under what circumstances New Mexico will permit itself to be sued in its own courts on a federal claim, notwithstanding the constitutional sovereign immunity the United States Supreme Court has so carefully and

recently articulated. After all, we noted in the above passage that the United States Supreme Court had struck a balance of power between the Federal Government and the State of New Mexico, a balance that preserved the Legislature's power to waive the State's immunity and under the principle of separation of powers that is part of the New Mexico Constitution limited our own.

Cockrell itself seems to me to hold the answer to any apparent inconsistency. The constitutional sovereign immunity that the United States Supreme Court has articulated so recently is limited. We made this point in *Cockrell* several times. We said, for example: "[I]n the *limited context of a private action for money damages* authorized by a federal statute, 'the States do retain a *constitutional immunity* from suit in their own courts.'" 2002-NMSC-009, ¶ 11 (first emphasis added) (quoting *Alden,* 527 U.S. at 745). We also said: "This State, by virtue of its sovereign role in the Union, is constitutionally immune from *private suits for damages* under a federal statute." *Id.* ¶ 15 (emphasis added). Finally, we said: "We hold that the State has not waived its constitutional sovereign immunity from *private suits for damages* based on a violation of federal law." *Id.* ¶ 29 (emphasis added).

Consequently, we have indicated our understanding that the Legislature's power to waive New Mexico's constitutional sovereign immunity is the power to decide whether to expose the State to liability for money damages for violations of federal law. Whether the doctrine of *Ex parte Young* applies is a decision that the Court explicitly and appropriately reserved for itself. In *Cockrell,* we stated:

> Despite the existence of the State's constitutional sovereign immunity, state employees who do not receive the benefits to which they are entitled under the FLSA are not without recourse. . . . [C]onstitutional sovereign immunity "does not bar certain actions against state officers for injunctive or declaratory relief."

2002-NMSC-009, ¶ 28 (quoting *Alden,* 527 U.S. at 757).

It does seem to me that in applying *Ex parte Young* to the facts of this case, we are extending an historic doctrine beyond its historic limits. *See generally* 1 Laurence H. Tribe, *American Constitutional Law* § 3-27, at 555-56 (3d ed.2000). In the past, the doctrine of *Ex parte Young* has permitted suits in federal courts against individual state officers on the basis that when acting illegally, those officers should be viewed as stripped of the immunity they otherwise would enjoy as representatives of a sovereign state. *Id.* In this case, the Board acted, from its perspective, legally. The Board members certainly acted consistently with and in reliance on a state statute. In this case, we in effect declare action taken pursuant to a state statute illegal, if it conflicts with a federal statute. As the majority opinion points out, we are not alone in recognizing that *Ex parte Young* can apply to an action taken in state courts. *Id.* ¶ 25. The most difficult question for me has been whether we ought to equate the Board's action with the conduct to which the *Ex parte Young* doctrine historically has applied, but I also have found it difficult to determine whether the claim asserted in this case is in fact a claim for prospective, injunctive relief within the scope of the doctrine. *See Gill v. Pub. Employees Ret. Bd.,* 2003-NMCA-038, ¶ 10, 133 N.M. 345, 62 P.3d 1227.

The Court of Appeals seems to me to make a valid point in suggesting the historical anomaly of relying on *Ex parte Young* to preserve the supremacy of federal law in a state court when some of the language in the federal cases suggests Congress lacked the power to make the law supreme or, put another way, that a state's constitutional sovereign immunity is an equally important principle of constitutional law, which inherently limits the reach of federal law. *See e.g. Kimel v. Fla. Bd. of Regents,* 528 U.S. 62 (2000). In *Kimel* the Court held "that the [Age Discrimination in Employment Act] is not a valid exercise of Congress' power under § 5 of the Fourteenth Amendment" and that therefore the "purported abrogation of the States' sovereign immunity is accordingly invalid." *Id.* at 91. If, by that language, the United States Supreme Court meant to say that Congress had the power to enact legislation that is binding on the States but not the power to make it enforceable, Congress' power must be limited, even if supreme. We noted this anomaly in *Cockrell.* There we said that "[w]e recognize[d] the incongruity of the State's obligation to pay overtime wages . . . without a concomitant method of enforcement for employees." *Cockrell,* 2002-NMSC-009, ¶ 27.

The Court of Appeals opinion elegantly refers to the tension within the case law in a single sentence: "*If* the purpose of *Ex parte Young* doctrine is to ensure the Constitution's supremacy, then a congressional act that is constitutionally outside of Congress's power to enact as against the states should not be permitted to be enforced against the states in any way, either in state or federal court." *Gill,* 2003-NMCA-038, ¶ 12 (emphasis added). I understand the Court of Appeals to be observing, correctly, that *Ex parte Young* began as a protection of the supremacy of the

United States Constitution. If the Constitution limited Congressional power to make federal legislation applicable to the states, then it *should* be the case (not necessarily *is* the case) that the *Ex parte Young* doctrine, a constitutional concept, would not be available to facilitate what Congress otherwise did not have the power under the Constitution to accomplish.

Again, I think *Cockrell* addresses and helps resolve what would otherwise be an unbearable tension. Because the constitutional sovereign immunity the United States Supreme Court has so recently articulated is limited to an immunity from money damages, and does not preclude suits for injunctive relief, Congress' power in enacting remedial legislation is not as limited as the language in *Kimel* suggests. Because State constitutional sovereign immunity is limited, Congress' power to enact remedial legislation can be understood to include the power to make that legislation enforceable in actions to which a State is not immune. For this reason, we ought not foreclose the suit before us on the basis of constitutional sovereign immunity. Having recognized the federal cases as articulating a limited constitutional sovereign immunity, we are able to recognize the viability of the present claim. The federal statute on which this claim rests continues to have validity in state court, to the extent the State is not immune as a matter of federal constitutional law. The complaint stating the claim should not have been dismissed, because we should equate the Board's conduct with the conduct to which *Ex parte Young* historically applied.

Nevertheless, the balance to which we referred in *Cockrell* is a balance not only between Federal and State power but also between legislative and judicial power. If

we are careful in applying *Ex parte Young,* we can respect the Legislature's exclusive power to waive the State's constitutional sovereign immunity without surrendering our own power to recognize the development of the *Ex parte Young* doctrine in an appropriate way. For the reasons stated in the majority opinion, I believe we are extending the *Ex parte Young* doctrine consistent with United States Supreme Court precedent, although injunctive relief can be every bit as onerous a burden on the state and its treasury as the potential exposure of the state to monetary damages. *See* Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983,* 53 Stan. L. Rev. 1311, 1314 (2001) (arguing that "injunctive relief may turn out to be far broader and more intrusive than the damages that would have been available after the fact, both because it may involve more invasive judicial supervision of state entities and because some of the defenses that would be available in after-the-fact-litigation, most notably qualified immunity, are unavailable in cases seeking prospective relief"). What has helped me distinguish this case from *Cockrell* is the existence of a separate fund against which the claim has been made, making it possible to characterize the relief sought as prospective, injunctive relief, "that would only have an ancillary effect on the state treasury." Majority Op. ¶¶ 33, 34. In *Cockrell,* on the other hand, the plaintiff sought money damages for breach of a state statute, which I assume would not have had an ancillary effect on the state treasury. 2002-NMSC-009, ¶ 1. The distinctions we are making may seem thin, but the analysis that results from those distinctions is consistent with *Cockrell* and seems to permit us to reconcile conflicting language and ideas within the federal cases. On that

basis, and on the basis of the analysis contained in the majority opinion, I concur.

/s/ Pamela B. Minzner
PAMELA B. MINZNER,
Justice

APPENDIX F

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

June 9, 2004

NO. 27,823

JAMES GILL,

Plaintiff-Petitioner,

vs.

PUBLIC EMPLOYEES RETIREMENT BOARD
OF THE PUBLIC EMPLOYEES RETIREMENT
ASSOCIATION OF NEW MEXICO,

Defendant-Respondent.

ORDER

WHEREAS, this matter came on for consideration by the Court upon respondent's motion for recall or stay of mandate, and the Court having considered said pleadings and being sufficiently advised, Chief Justice Petra Jimenez Maes, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Richard C. Bosson, and Justice Edward L. Chávez concurring;

NOW, THEREFORE, IT IS ORDERED that the motion hereby is GRANTED and the mandate issued to the New Mexico Court of Appeals on May 7, 2004, hereby is RECALLED.

IT IS SO ORDERED.

WITNESS, Honorable Petra Jimenez Maes, Chief Justice of the Supreme

Court of the State of New Mexico, and the seal of said Court this 9th of June, 2004.

(SEAL) /s/ Kathleen Jo Gibson
Kathleen Jo Gibson, Chief Clerk of the Supreme Court of the State of New Mexico

APPENDIX G

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

April 28, 2004

NO. 27,823

JAMES GILL,

Plaintiff-Petitioner,

vs.

PUBLIC EMPLOYEES RETIREMENT BOARD of the PUBLIC EMPLOYEES RETIREMENT ASSOCIATION OF NEW MEXICO,

Defendant-Respondent.

ORDER

WHEREAS, this matter came on for consideration by the Court upon motion for rehearing, and the Court having considered said motion and being sufficiently advised, Chief Justice Petra Jimenez Maes, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Richard C. Bosson, and Justice Edward L. Chávez concurring;

NOW, THEREFORE, IT IS ORDERED that the motion for rehearing hereby is DENIED and the opinion filed on March 30, 2004, hereby is withdrawn and a substitute opinion issued April 28, 2004.

IT IS SO ORDERED.

WITNESS, Honorable Patricio M. Serna, Chief Justice of the Supreme Court of the State of New

Mexico, and the seal of said Court this 28th day of April, 2004.

/s/ Kathleen Jo Gibson
Kathleen Jo Gibson, Chief
Clerk of the Supreme Court
of the State of New Mexico

(SEAL)

APPENDIX H

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

May 7, 2004

NO. 27,823

JAMES GILL,

Plaintiff-Petitioner,

vs.

PUBLIC EMPLOYEES RETIREMENT
BOARD of the PUBLIC EMPLOYEES
RETIREMENT ASSOCIATION OF
NEW MEXICO,

Defendant-Respondent.

ORDER

WHEREAS, this matter came on for consideration by the Court upon motion for rehearing on the substituted opinion issued April 28, 2004, and the Court having considered said motion and being sufficiently advised, Chief Justice Petra Jimenez Maes, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Richard C. Bosson, and Justice Edward L. Chávez concurring;

NOW, THEREFORE, IT IS ORDERED that the second motion for rehearing hereby is DENIED.

IT IS SO ORDERED.

WITNESS, Honorable Petra Jimenez Maes, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 7th day of May, 2004.

/s/ Kathleen Jo Gibson

(SEAL)

Kathleen Jo Gibson, Chief
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX I

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

May 20, 2004

NO. 27,823

JAMES GILL,

Plaintiff-Petitioner,

vs.

PUBLIC EMPLOYEES RETIREMENT BOARD of the PUBLIC EMPLOYEES RETIREMENT ASSOCIATION OF NEW MEXICO,

Defendant-Respondent.

ORDER

WHEREAS, this matter came on for consideration by the Court upon Motion for Rehearing and the Court having considered said motion, and being sufficiently advised, Chief Justice Petra Jimenez Maes, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Richard C. Bosson, and Justice Edward L. Chávez concurring;

NOW, THEREFORE, IT IS ORDERED that the motion for rehearing hereby is **DENIED**.

IT IS SO ORDERED.

WITNESS, Hon. Petra Jimenez Maes, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 20th day of May, 2004.

/s/ Madeline Garcia

(SEAL) Madeline Garcia,
Chief Deputy Clerk

APPENDIX J

The Age Discrimination in Employment Act:
29 U.S.C. §§ 621-634

Section 623(a): Prohibition of age discrimination: Employer practices

It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

Section 623(i): Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits –

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

Section 626(b): Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid

overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

Section 626(c): Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

Section 626(d): Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal

Employment Opportunity Commission. Such a charge shall be filed –

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

Section 626(e): Reliance on administrative rulings; notice of dismissal or termination; civil action after receipt of notice

Section 259 of this title shall apply to actions under this chapter. If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630(a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

Section 630. – Definitions

For the purposes of this chapter –

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: Provided, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means

(1) any agent of such a person, and

(2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.